

# INDIANA LAW REVIEW

---

## 2009 SURVEY OF RECENT DEVELOPMENTS IN INDIANA LAW

### CONTRIBUTORS TO THIS ISSUE

*The Honorable Chief Justice Randall T. Shepard*

*Joseph R. Alberts  
Jennifer Andres  
Bryan H. Babb  
Kellie M. Barr  
Emmanuel V.R. Boulukos  
Christopher A. Brown  
Daniel K. Burke  
Victoria Calhoon  
Tom D. Conley  
Mark J. Crandley  
Michael A. Dorelli  
Suzanna Hartzell-Baird  
Lawrence A. Jegen, III  
Jeanine Kerridge  
Charles M. Kidd  
Angela Krahulik  
Steven P. Lammers*

*Jon Laramore  
Tanya D. Marsh  
Jeff Peabody  
James Petersen  
April Sparks Pyatt  
Marcia A. Reddick  
Joseph P. Rompala  
Phillip T. Scaletta  
Joel M. Schumm  
Richard K. Shoultz  
Freedom S.N. Smith  
P. Jason Stephenson  
Paul C. Sweeney  
Seth M. Thomas  
Robert B. Thornburg  
Milton Augustus Turner  
James B. Williams*



INDIANA UNIVERSITY

SCHOOL OF LAW-INDIANAPOLIS  
IUPUI





# BNA's Law School Program

**Multiple platforms, more choices  
—for staff and students.**

Delivery of timely information is one of the cornerstones of BNA's success. Now, BNA delivers services electronically, through IP authentication, to all law school faculty staff and their students.

By subscribing to any of four law school-wide electronic packages or building your own custom package, you can give your students access to the same valuable information as practicing attorneys. They'll conduct research and follow changes in the law in the same way senior partners do. Your students will not only be prepared for internships and clerkships, they'll be better equipped for any job.

To learn more about BNA's law school program, call BNA Customer Service at **800-572-3374** or visit us at **[www.bna.com/lawschool](http://www.bna.com/lawschool)**.



# **BNA**®

*Essential information. Expert analysis.*



# Indiana Law Review

Volume 43

2009-2010

*Editor-in-Chief*  
Daniel E. Pulliam

*Executive Managing Editor*  
E. Ashley Paynter

*Senior Executive Editor*  
Daniel Cicchini

*Symposium Editor*  
Ann Harris Smith

*Articles Editors*  
Kayla Britton  
Dawn Butler  
Kyle Gobel  
Glen Koch  
Victoria Lewinski  
Lauren E. Miller  
Chad Pryor  
Justin Walton

*Executive Notes Editor*  
Danielle Tucker

*Executive Articles Editors*  
Emily Slaten  
Peter T. Tschanz

*Note Development Editors*  
Marie Alexander  
Laura Katherine Boren  
Hattie Harman  
Duane Marks  
Tim McKay  
Matthew Neumann  
Kyli Willis

---

## *Associate Editors*

James C. Ciula  
John P. Delaney  
Justin P. Forkner  
Caitlin K. Nicholl

---

## *Members*

Courtney Andreone  
Amanda Baker  
Sara Benson  
Lauren Berger  
Charles Daugherty  
Jennifer Ekblaw  
Jonathan Faust

Zachary G. Jacob  
Brian Jarman  
Jared W. Joselyn  
Thomas Landrigan  
Kyle McClammer  
Kate Mercer Lawson

Timothy J. Moriarty  
Sarah Orme  
Mac Schilling  
Justin Spack  
Jordan Szymialis  
David T. Vlink  
Perry Whan

---

*Editorial Specialist*  
Chris Paynter

*Faculty Advisors*  
Andrew R. Klein  
R. George Wright



INDIANA LAW REVIEW

(ISSN 0090-4198)

Published four times a year by Indiana University. Editorial and Business Offices are located at:

*Indiana Law Review*  
Lawrence W. Inlow Hall  
530 W. New York Street  
Indianapolis, IN 46202-3225  
(317) 274-4440

**Subscriptions.** Current subscription rates for an academic year are \$30.00 (domestic mailing) and \$35.00 (foreign mailing) for four issues. Unless the Business Office receives notice to the contrary, all subscriptions will be renewed automatically. *Address changes must be received at least one month prior to publication to ensure prompt delivery and must include old and new address and the proper zip code.*

**Single and Back Issues.** Current single regular issues may be obtained from the *Indiana Law Review* Business Office for \$10.00. Current Survey issues may be purchased for \$20.00. The Symposium Issue may be purchased for \$15.00. Please enclose payment with order. Claims for nonreceipt of current year's issues must be made within six months of the mailing date. Back issues may be ordered from: William S. Hein & Co., Inc., 1285 Main St., Buffalo, NY 14209-1987, (800) 828-7571, (716) 883-8100 fax, mail@wshein.com (e-mail for orders). Back issues are also available in an image-based format through HeinOnline, [www.heinonline.org](http://www.heinonline.org) and Ebsco Publishing, [www.ebscohost.com](http://www.ebscohost.com).

**Manuscripts.** The *Indiana Law Review* invites submission of unsolicited manuscripts. All citations should conform to *The Bluebook A Uniform System of Citation* (18th ed. 2005). Manuscripts should be double-spaced with standard one-inch margins. The *Indiana Law Review*, as a matter of policy, promotes the use of gender-neutral language, and alternate use of the female or male pronoun is intended to refer to both female and male.

**Copyright:** Copyright 2010. The Trustees of Indiana University. Except as may be expressly provided elsewhere in this publication, permission is hereby granted to produce and distribute copies of individual works from this publication for nonprofit education purposes, provided that copies are distributed at or below cost, and that the author, source, and copyright notice are included on each copy. This permission is in addition to rights of reproduction granted under Sections 107, 108, and other provisions of the U.S. Copyright Act.

The INDIANA LAW REVIEW (ISSN 0090-4198) is the property of Indiana University and is published quarterly by the Indiana University School of Law—Indianapolis, which assumes complete editorial responsibility thereof. Current subscription rates for an academic year are: one year domestic \$30.00; foreign \$35.00. Send all correspondence to Editorial Specialist, *Indiana Law Review*, Indiana University School of Law—Indianapolis, Lawrence W. Inlow Hall, 530 W. New York Street, Indianapolis, Indiana 46202-3225. Publication office: 530 W. New York Street, Indianapolis, Indiana 46202-3225. Periodicals postage paid at Indianapolis, Indiana 46201.

POSTMASTER: Send address changes to INDIANA LAW REVIEW, Lawrence W. Inlow Hall, 530 W. New York Street, Indianapolis, Indiana 46202-3225.




The entire text of this Law Review is printed on recycled paper.









Digitized by the Internet Archive  
in 2011 with funding from  
LYRASIS Members and Sloan Foundation



# Indiana International & Comparative Law Review

The *Indiana International & Comparative Law Review*, published by the Indiana University School of Law - Indianapolis since 1991, is a student-edited law journal that provides a forum for the discussion and analysis of contemporary issues in public and private international law. The *Review* publishes articles by prominent legal scholars, practitioners, and policy makers from around the world, as well as student-written notes and comments.

The *Review* is published twice annually, with a periodic third issue devoted to a specific topic in international or comparative law. In 1994, in conjunction with the Italian Academy for Advanced Studies in America at Columbia University, the *Review* published a special issue on the political and social aspects of Italian law. In 1996, the *Review* published an issue addressing various aspects of Chinese law.

---

Name

---

School/Firm/Business

---

Address

---

City, State, Zip Code

Subscriptions within the U.S. are \$18.00 per year and outside the U.S. are \$21.00 per year. I enclose \$\_\_\_\_\_ for \_\_\_\_\_ subscription(s) to the *Indiana International & Comparative Law Review*. Please make your check payable to *Indiana International & Comparative Law Review*.

Mail to:

Executive Production Editor  
*Indiana International & Comparative Law Review*  
Lawrence W. Inlow Hall  
530 West New York Street  
Indianapolis, Indiana 46202







In 2003, Indiana University School of Law - Indianapolis established a specialty law review focused specifically on health care law and policy:

## INDIANA HEALTH LAW REVIEW

The scope of the INDIANA HEALTH LAW REVIEW includes bioethics, malpractice liability, managed care, anti-trust, health care organizations, medical-legal research, legal medicine, food and drug, and other current health-related topics.

**Detach and mail this subscription form today to receive future issues**

### Subscription Price: \$20.00

- Two (2) Issues
- Automatic Renewal
- Foreign Mailing Is Extra

#### Mail form to:

Indiana Health Law Review  
Indiana University School of Law – Indianapolis  
Attn: Executive Business Editor  
Lawrence W. Inlow Hall, Room 136C  
530 W. New York Street  
Indianapolis, IN 46202-3225

#### Questions?

Email: [ihlr@iupui.edu](mailto:ihlr@iupui.edu)  
Phone: (317) 278-9519  
[www.indylaw.indiana.edu/~ihlr](http://www.indylaw.indiana.edu/~ihlr)

---

#### Mailing Address:

Name/Title \_\_\_\_\_  
Company/School \_\_\_\_\_  
Address \_\_\_\_\_  
City \_\_\_\_\_ State \_\_\_\_ ZIP \_\_\_\_\_  
Email \_\_\_\_\_

**Payment Method:** ☐ Enclosed  
(Make Check Payable to  
INDIANA HEALTH LAW REVIEW)

☐ Bill Me Later







## Indiana University School of Law—Indianapolis

### 2009-2010 ADMINISTRATIVE OFFICERS AND FACULTY

#### Administrative Officers

- MICHAEL A. MCROBBIE, *President of the University*. Ph.D., Australian National University.
- CHARLES R. BANTZ, *Chancellor, Indiana University-Purdue University—Indianapolis*. B.A., M.A., University of Minnesota; Ph.D., The Ohio State University.
- GARY R. ROBERTS, *Dean and Gerald L. Bepko Professor of Law*. B.A., Bradley University; J.D., Stanford University.
- PAUL N. COX, *Vice Dean and Centennial Professor of Law*. B.S., Utah State University; J.D., University of Utah; LL.M., University of Virginia.
- JAMES P. NEHF, *Associate Dean for Graduate Studies and Cleon H. Foust Fellow; Professor of Law and John S. Grimes Fellow*. B.A., Knox College; J.D., University of North Carolina Law School.
- CLAIRE GROVE, *Assistant Dean for Graduate Studies*. B.A., Indiana University; J.D., Indiana University School of Law—Indianapolis.
- JONNA KANE MACDOUGALL, *Assistant Dean for Institutional Advancement*. B.A., M.A., Indiana University; J.D., Indiana University School of Law—Indianapolis.
- CHASTITY THOMPSON, *Assistant Dean for Professional Development*. A.S., B.A., Alabama State University; M.B.A., Auburn University; J.D., Indiana University School of Law—Indianapolis.
- ELIZABETH ALLINGTON, *Director for External Affairs*. B.A., Indiana University; M.A., M. Phil., New York University.
- TERESA (TERRI) J. CUELLAR, *Director of Technology Services*. B.S., St. Bonaventure University, New York.
- JOYCE M. HERTKO, *Director of Major Gifts*. B.A., Knox College; M.S., Western Illinois University; Ph.D., Indiana University.
- AMANDA KAMMAN, *Director for Development*. B.A., Indiana University.
- PATRICIA K. KINNEY, *Director of Admissions*. B.S., Purdue University; J.D., Indiana University School of Law—Indianapolis.
- VIRGINIA MARSCHAND, *Director of Administrative and Fiscal Affairs*. B.A., M.P.A., Indiana University; J.D., Indiana University School of Law—Indianapolis.
- HEATHER MCCABE, *Director, Public Health Law Program, William S. and Christine S. Hall Center for Law and Health*. B.A., M.S.W., Indiana University; J.D., Indiana University School of Law—Indianapolis.
- SONJA RICE, *Egypt Program Director*. B.A., Purdue University; J.D., Indiana University School of Law—Indianapolis.
- LAWANDA W. WARD, *Director of Pro Bono Program and Public Interest*. B.A., Murray State University; M.A., Illinois State University; M.S., Old Dominion University; J.D., Indiana University School of Law—Indianapolis.
- TAMARA MCMILLIAN, *Associate Director of Professional Development*. B.A., Southern Illinois University—Carbondale; M.S.W., Southern Illinois State University—Carbondale; J.D., DePaul University College of Law.
- SUSIE AGNEW, *Assistant Director of Student Services*. Clark College.
- WILLIAM J. BAKER, *Assistant Director of Technology Services*.
- KAREN H. MILLER, *Assistant Director for Admissions*. Midway College.
- LISA SCHRAGE, *Assistant Director for Donor Relations*. B.S., Marian College.

#### Faculty

- CYNTHIA M. ADAMS, *Clinical Professor of Law and Co-Director of the Latin American Law Program*. B.A., Kentucky Wesleyan College; J.D., Indiana University School of Law—Indianapolis.
- JUDITH FORD ANSPACH, *Professor of Law and Director, Ruth Lilly Law Library*. B.S., M.L.S., Kent State University; J.D., Mississippi College School of Law.
- CYNTHIA BAKER, *Clinical Associate Professor of Law and Director, Program on Law and State Government*. B.A., J.D., Valparaiso University.
- GERALD L. BEPKO, *Indiana University-Purdue University—Indianapolis Chancellor Emeritus, Indiana University Trustee Professor and Professor of Law*. B.S., Northern Illinois University; J.D., ITT/Chicago-Kent College of Law; LL.M., Yale Law School.



SHAWN BOYNE, *Associate Professor of Law and Dean's Fellow*. B.A., Cornell University; M.B.A., University of Minnesota; J.D., University of Southern California's Gould School of Law; M.A., University of Wisconsin; LL.M., Justus-Liebig-Universität.

KAREN E. BRAVO, *Associate Professor Law; John S. Grimes Fellow and Dean's Fellow*. B.A., The University of the West Indies; J.D., Columbia University School of Law; LL.M., New York University School of Law.

ROBERT BROOKINS, *Professor of Law*. B.S., University of South Florida; J.D., Ph.D., Cornell University.

KENNETH D. CHESTEK, *Clinical Associate Professor of Law*. B.A., Pennsylvania State University; J.D., University of Pittsburgh School of Law.

DANIEL H. COLE, *R. Bruce Townsend Professor of Law*. A.B., Occidental College; A.M., University of Chicago; J.D., Lewis and Clark Law School; J.S.M., J.S.D., Stanford Law School.

JEFFREY O. COOPER, *Associate Professor of Law*. A.B., Harvard University; J.D., University of Pennsylvania Law School.

ERIC DANNENMAIER, *Associate Professor of Law and Dean's Fellow*. B.A., Drury College; J.D., Boston University; LL.M., Columbia University; M. St., Oxford University.

JAMES D. DIMITRI, *Clinical Professor of Law*. B.S., Indiana University; J.D., Valparaiso University School of Law.

JENNIFER A. DROBAC, *Professor of Law and Director, Central and Eastern European Law Summer Program*. B.A., M.A., Stanford University; J.D., J.S.D., Stanford Law School.

GEORGE E. EDWARDS, *Carl M. Gray Professor of Law; Faculty Advisor to the LL.M. Track in International Human Rights Law; Director, Program in International Human Rights Law and John S. Grimes Fellow*. B.A., North Carolina State University; J.D., Harvard Law School.

FRANK EMMERT, *John S. Grimes Professor of Law and Executive Director, Center for International and Comparative Law*. Erstes Juristisches Staatsexamen (J.D.), University of Munich Law School; LL.M., The University of Michigan Law School; Ph.D., University of Maastricht; Diploma, European University Institute.

NICHOLAS GEORGAKOPOULOS, *Harold R. Woodard Professor of Law*. Ptyhion Nomikis, Athens University School of Law; LL.M., S.J.D., Harvard Law School.

CARRIE HAGAN-GRAY, *Clinical Associate Professor of Law*. B.A., University of Kansas; J.D., University of Cincinnati, College of Law.

JOHN LAWRENCE HILL, *Professor of Law; Adjunct Professor of Philosophy and John S. Grimes Fellow*. B.A., Northern Illinois University; J.D., Ph.D., Georgetown University.

LINDA KELLY HILL, *M. Dale Palmer Professor of Law*. B.A., J.D., University of Virginia.

MAX HUFFMAN, *Associate Professor of Law and Dean's Fellow*. B.A., Cornell University; J.D., University of Chicago College of Law.

LAWRENCE A. JEGEN, III, *Thomas F. Sheehan Professor of Tax Law and Policy*. A.B., Beloit College; J.D., M.B.A., The University of Michigan; LL.M., New York University School of Law.

ROBERT A. KATZ, *Professor of Law and John S. Grimes Fellow*. A.B., Harvard College; J.D., University of Chicago Law School.

ELEANOR D. KINNEY, *Hall Render Professor of Law, Co-Director of the William S. and Christine S. Hall Center for Law and Health*. B.A., Duke University; M.A., University of Chicago; J.D., Duke University School of Law; M.P.H., University of North Carolina.

ANDREW R. KLEIN, *Paul E. Beam Professor of Law*. B.A., University of Wisconsin; J.D., Emory University School of Law.

NORMAN LEFSTEIN, *Professor of Law and Dean Emeritus*. LL.B., University of Illinois College of Law; LL.M., Georgetown University Law School.

MARÍA PABÓN LÓPEZ, *Professor of Law and Dean's Fellow*. B.A., Princeton University; J.D., University of Pennsylvania Law School.

GERARD N. MAGLIOCCA, *Professor of Law; Co-Director, Chinese Law Summer Program and John S. Grimes Fellow*. B.A., Stanford University; J.D., Yale Law School.

ALLISON MARTIN, *Clinical Associate Professor of Law*. B.S., J.D., University of Illinois.

DEBORAH MCGREGOR, *Clinical Professor of Law and Assistant Director of Legal Analysis, Research and Communication*. B.A., University of Evansville; J.D., Georgetown University Law School.

SUSANAH M. MEAD, *Professor of Law*. B.A., Smith College; J.D., Indiana University School of Law—Indianapolis.



- MARY H. MITCHELL, *Alan H. Cohen Professor of Law*. A.B., Butler University; J.D., Cornell Law School.
- EMILY MORRIS, *Associate Professor of Law and Dean's Fellow*. A.B., Harvard University; J.D., University of Michigan Law School.
- NOVELLA NEDEFF, *Clinical Associate Professor of Law*. B.A., J.D., Indiana University.
- DAVID ORENTLICHER, *Samuel R. Rosen Professor of Law and Co-Director of the William S. and Christine S. Hall Center for Law and Health*. A.B., Brandeis University; J.D., M.D., Harvard College.
- JOANNE ORR, *Clinical Professor of Law*. B.S., Indiana State University; J.D., California Western School of Law.
- ANTONY PAGE, *Associate Professor of Law and Dean's Fellow*. B. Comm., McGill University; M.B.A., Simon Fraser University; J.D., Stanford Law School.
- H. KATHLEEN PATCHEL, *Associate Professor of Law*. A.B., Huntington College; J.D., University of North Carolina Law School; LL.M., Yale Law School.
- MICHAEL J. PITTS, *Associate Professor of Law; Dean's Fellow and John S. Grimes Fellow*. B.S.J., Northwestern University; J.D., Georgetown University Law Center.
- PETER A. PRESCOTT, *Associate Professor of Law*. B.A., Augustana College; M.S., The University of Chicago; M.P.A., The University of Texas at Austin; J.D., The University of Houston Law Center.
- FRAN QUIGLEY, *Visiting Professor*. B.A., Hanover College; M.A., Indiana University; J.D., Indiana University School of Law—Indianapolis.
- FLORENCE WAGMAN ROISMAN, *William F. Harvey Professor of Law*. B.A., University of Connecticut; LL.B., Harvard Law School.
- GARY R. ROBERTS, *Dean and Gerald L. Bepko Professor of Law*. B.A., Bradley University; J.D., Stanford University.
- JOAN M. RUHTENBERG, *Professor of Law and Director of Legal Analysis, Research and Communication*. B.A., Mississippi University for Women; J.D., Indiana University School of Law—Indianapolis.
- JOEL M. SCHUMM, *Clinical Professor of Law and Director, Judicial Externship Program*. B.A., Ohio Wesleyan University; M.A., University of Cincinnati; J.D., Indiana University School of Law—Indianapolis.
- FRANCES WATSON, *Clinical Professor of Law*. B.S., Ball State University; J.D., Indiana University School of Law—Indianapolis.
- LLOYD T. WILSON, JR., *Professor of Law and Co-Director, Chinese Law Summer Program*. B.A., Wabash College; M.A., Duke University; J.D., Indiana University School of Law—Bloomington.
- MARY T. WOLF, *Clinical Professor of Law and Director of Clinical Programs and Externships*. B.A., Saint Xavier College; J.D., University of Iowa College of Law.
- R. GEORGE WRIGHT, *Lawrence A. Jegen III Professor of Law*. A.B., University of Virginia; Ph.D., Indiana University; J.D., Indiana University School of Law—Indianapolis.

#### Emeriti Faculty

- THOMAS B. ALLINGTON, *Professor of Law Emeritus*. B.S., J.D., University of Nebraska; LL.M., New York University School of Law.
- EDWARD P. ARCHER, *Professor of Law Emeritus*. B.M.E., Renesselaer Polytechnic Institute; J.D., LL.M., Georgetown University Law School.
- JAMES F. BAILEY, III, *Professor of Law Emeritus and Director of the Law Library Emeritus*. A.B., J.D., M.A.L.S., The University of Michigan.
- CLYDE HARRISON CROCKETT, *Professor of Law Emeritus*. A.B., J.D., University of Texas; LL.M., University of London (The London School of Economics and Political Science).
- DEBRA A. FALENDER, *Professor of Law Emerita*. A.B., Mount Holyoke College; J.D., Indiana University School of Law—Indianapolis.
- DAVID A. FUNK, *Professor of Law Emeritus*. A.B., College of Wooster; J.D., Case Western Reserve University School of Law; M.A., The Ohio State University; LL.M., Case Western Reserve University; LL.M., Columbia Law School.
- PAUL J. GALANTI, *Professor of Law Emeritus*. A.B., Bowdoin College; J.D., University of Chicago Law School.
- HELEN P. GARFIELD, *Professor of Law Emerita*. B.S.J., Northwestern University; J.D., University of Colorado School of Law.
- HAROLD GREENBERG, *Professor of Law Emeritus*. A.B., Temple University; J.D., University of Pennsylvania Law School.



JEFFREY W. GROVE, *Professor of Law Emeritus*. A.B., Juniata College; J.D., George Washington University Law School.

WILLIAM F. HARVEY, *Carl M. Gray Professor of Law & Advocacy Emeritus*. A.B., University of Missouri; J.D., LL.M., Georgetown University Law School.

W. WILLIAM HODES, *Professor of Law Emeritus*, A.B., Harvard College; J.D., Rutgers University School of Law—Newark.

HENRY C. KARLSON, *Professor of Law Emeritus*. A.B., J.D., LL.M., University of Illinois College of Law.

WILLIAM ANDREW KERR, *Professor of Law Emeritus*. A.B., West University; B.S., Duke University; J.D., LL.M., Harvard Law School.

WILLIAM E. MARSH, *Professor of Law Emeritus*. B.S., J.D., University of Nebraska.

RONALD W. POLSTON, *Professor of Law Emeritus*. B.S., Eastern Illinois University; LL.B., University of Illinois College of Law.

KENNETH M. STROUD, *Professor of Law Emeritus*. A.B., J.D., Indiana University—Bloomington.

JAMES W. TORKE, *Carl M. Gray Professor of Law Emeritus*. B.S., J.D., University of Wisconsin.

JAMES PATRICK WHITE, *Professor of Law Emeritus*. A.B., University of Iowa; J.D., LL.M., George Washington University Law School.

LAWRENCE P. WILKINS, *William R. Neale Professor of Law Emeritus*. B.A., The Ohio State University; J.D., Capitol University Law School; LL.M., University of Texas School of Law.

#### Law Library Faculty

JUDITH FORD ANSPACH, *Professor of Law and Director, Ruth Lilly Law Library*. B.S., M.L.S., Kent State University; J.D., Mississippi College School of Law.

SUSAN BOLAND, *Head of Information Services*. B.A., Monmouth College; M.S., University of Illinois; J.D., Illinois University College of Law.

DEBRA DENSLAW, *Reference Librarian*. B.A., Franklin College; M.S., University of Illinois, Urbana-Champaign; J.D., Valparaiso School of Law.

RICHARD HUMPHREY, *Reference Librarian*. A.A., Brewton-Parker Junior College; B.A., Georgia Southwestern College; M.L.S., University of Kentucky.

WENDELL E. JOHNTING, *Assistant Director for Technical Services*. A.B., Taylor University; M.L.S., Indiana University.

CHRIS E. LONG, *Cataloging Librarian*. B.A., Indiana University; M.A., Indiana University; M.L.S., Indiana University.

STEVEN R. MILLER, *Reference Librarian*. B.S., Lebanon Valley College of Pennsylvania; M.A., Dominican University; M.S., Northwestern University; J.D., The John Marshall Law School.

MAHNAZ K. MOSHFEGH, *Serials/Acquisitions Librarian*. B.A., National University of Iran; M.S., Tehran University; M.A., Ball State University; M.L.S., Ph.D., Indiana University.

MIRIAM A. MURPHY, *Associate Director*. B.A., Purdue University; J.D., M.L.S., Indiana University—Bloomington.

KIYOSHI OTSU, *Automated Services and Media Librarian*. A.A., Parkland College; A.B., M.S., C.A.S., University of Illinois.



# Indiana Law Review

---

Volume 43

2010

Number 3

---

Copyright © 2010 by the Trustees of Indiana University

## TABLE OF CONTENTS

### SURVEY

- I. Introduction**  
Four Big, Dumb Trends Affecting State Courts  
*Randall T. Shepard* 533
- II. Supreme Court Review**  
An Examination of the Indiana Supreme Court Docket,  
Dispositions, and Voting in 2009  
*Mark J. Crandley* 541  
*P. Jason Stephenson*  
*Jeanine Kerridge*  
*Jeff Peabody*
- III. Administrative Law**  
Survey of Indiana Administrative Law  
*Joseph P. Rompala* 559
- IV. Appellate Procedure**  
Developments in Indiana Appellate Procedure: Rule  
Amendments, Remarkable Case Law, and Guidance for  
Appellate Practitioners  
*Bryan H. Babb* 579  
*Kellie M. Barr*  
*Suzanna Hartzell-Baird*
- V. Business and Contract Law**  
Recent Developments in Indiana Business and  
Contract Law  
*Michael A. Dorelli* 603  
*Phillip T. Scaletta*
- VI. Civil Procedure**  
Recent Developments in Indiana Civil Procedure  
*Daniel K. Burke* 639
- VII. Constitutional Law**  
Indiana Constitutional Developments: Vitality for the Ex  
Post Facto Clause, But Not the Education Clause  
*Jon Laramore* 665



<b>VIII. Criminal Law and Procedure</b>		
Recent Developments in Indiana Criminal Law and Procedure	<i>Joel M. Schumm</i>	691
<b>IX. Environmental Law</b>		
2008-2009 Environmental Law Survey	<i>Seth M. Thomas</i> <i>Victoria Calhoon</i> <i>Freedom S.N. Smith</i> <i>Jennifer Andres</i> <i>Angela Krahulik</i>	723
<b>X. Evidence</b>		
Recent Developments in Indiana Evidence Law October 1, 2008 – September 30, 2009	<i>Paul C. Sweeney</i> <i>Emmanuel V.R. Boulukos</i>	773
<b>XI. Insurance Law</b>		
Survey of Recent Developments in Insurance Law	<i>Richard K. Shoultz</i>	815
<b>XII. Intellectual Property Law</b>		
Developments in Intellectual Property Law	<i>Christopher A. Brown</i>	837
<b>XIII. Medical Malpractice</b>		
Recent Developments in Medical Malpractice	<i>Steven P. Lammers</i>	855
<b>XIV. Product Liability</b>		
Survey of Recent Developments in Indiana Product Liability Law	<i>Joseph R. Alberts</i> <i>James Petersen</i> <i>Robert B. Thornburg</i>	873
<b>XV. Professional Responsibility</b>		
2009 Survey of the Law of Professional Responsibility	<i>Charles M. Kidd</i>	919
<b>XVI. Property Law</b>		
Recent Developments in Indiana Real Property and Related Areas of Law	<i>Marci A. Reddick</i>	937
The Stagnation of Indiana Real Property Law	<i>April Sparks Pyatt</i> <i>Tanya D. Marsh</i>	967



**XVII. Taxation**

Recent Developments in Indiana Taxation  
Survey 2009

*Lawrence A. Jegen, III* 999

*James B. Williams*

*Tom D. Conley*

**XVIII. Tort Law**

Recent Developments in Indiana Tort Law

*Milton Augustus Turner* 1053







# FOUR BIG, DUMB TRENDS AFFECTING STATE COURTS

RANDALL T. SHEPARD\*

The richness of this law review's annual survey issue rests in the assessments of developing substantive law described by scholars from our profession's three leading elements: practitioners, judges, and law faculty. Our task as lawyers in considering and re-considering statutes, common law, and constitutions in the course of working through new issues and new facts is the great intellectual challenge of being a lawyer.

Still, the debate over "what the law is" or "what the law should be" occurs against a larger backdrop of a changing society and evolving legal structures. On many days, our profession aspires to focus on close analytical work, lifting up the most elegant examples of jurisprudence. On other days, we proclaim ourselves fans of simplicity. In considering the courts, the profession, as institutions, this Article takes the latter course. I adopt here one of the strategies of a friend who has built a remarkably successful career in the investment business, Gregory C. Donaldson of Evansville, Indiana. This splendid run has flowed from a variety of analytical approaches. For a time, at least, he fashioned some of his recommendations to clients from research under a theory he called "big, dumb trends." He focused on forces that are transforming society at the most macro level, trends that are right in front of us and quite obvious to all, but which have implications most of us have not thought through yet. There are at least four such trends with important implications for American courts.

## I. THE IDEAL OF IMPARTIALITY

The first big, dumb trend is one of great consequence, one that places us at risk of losing something valuable: the ideal of judicial impartiality. The defenders of impartiality are far too often losing against lawsuits that seek to obliterate the rules protecting judicial neutrality from damage in the course of judicial campaigns. These cases have the potential to carry the nation back to a time when too many places chose judges by putting the campaign contribution bucket out on the porch (or on the back row of the courtroom) to see who came along with the most money. Throughout much of the twentieth century, the legal profession advanced with substantial success a variety of tools aimed at sustaining courts as fair tribunals.<sup>1</sup> Now, there is a renewed debate about

---

\* Chief Justice of Indiana. A.B., 1969, Princeton University; J.D., 1972, Yale Law School; LL.M., 1995, University of Virginia School of Law.

1. Canon 30 admonished that:

A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusion of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.



whether courts and judges are simply politics by another means, or by contrast, whether they are places where dispute resolution occurs according to a minimum of force and a maximum of reason.<sup>2</sup> Those are two very different ideas.

This competition of opposing ideals is hardly confined to state court settings. When Judge David Hamilton appeared before the judiciary committee of the U.S. Senate in the spring of 2009 for his confirmation hearing for the U.S. Court of Appeals for the Seventh Circuit, the Senators posed merely four questions.<sup>3</sup> But the nominee appearing just before Judge Hamilton, a district judge from Maryland whom President Obama nominated for the Fourth Circuit, became the feature story of the day by virtue of a grilling from Senator Russ Feingold. The theme of the Feingold inquiry was illustrated by a thread that ran: Are you somebody we ought to confirm, in light of the fact that you once served on the board of directors of the Foundation for Research on Economics and the Environment?<sup>4</sup>

---

While holding judicial office he should decline nomination to any other place which might reasonably tend to create a suspicion or criticism that the proper performance of his judicial duties is prejudiced or prevented thereby.

If a judge becomes a candidate for any office, he should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.

See REPORT OF THE FORTY-SEVENTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 768 (1924) (Canon 30).

2. See Curt Anderson, *States, Congress Wrestle with Judicial Bias Rules*, ASSOCIATED PRESS, Feb. 19, 2010, available at <http://abcnews.go.com/US/wireStory?id=9884470>; Robert Barnes, *Court Ties Campaign Largess to Judicial Bias*, WASH. POST, June 9, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/08/AR2009060801366.html>; Brian Witte, *O'Connor: Campaign Ruling a Concern in Judge Races*, ASSOCIATED PRESS, Mar. 4, 2010, available at <http://www democrats.com/oconnor-campaign-ruling-concern-judge-races>; Ann Woolner, *Ask No Promises of These Political Candidates*, BLOOMBERG NEWS, Sept. 1, 2006, available at [http://www.bloombergnews.com/apps/news?pid=20601039&sid=avGtpem\\_bVR4&refer=home](http://www.bloombergnews.com/apps/news?pid=20601039&sid=avGtpem_bVR4&refer=home).

3. Republican Senator Tom Coburn of Oklahoma said his office would submit about twenty questions for the record. Senator Coburn also asked Judge Hamilton about judges' use of international law and Judge Hamilton's statement that judges' jobs are to write footnotes to the Constitution. Judge Hamilton was also asked what he would miss about being a district judge and pro bono work. Hearing of the Judiciary Comm. on the Nominations of Andre M. Davis, to Be U.S. Cir. Judge for the Fourth Cir.; Thomas E. Perez, to Be Ass't Att'y Gen., Civ. Rights Div., Dep't of Justice; David F. Hamilton, to Be U.S. Cir. Judge for the Seventh Cir. Before the S. Comm. on the Judiciary, 111th Cong. (Apr. 21, 2009), available at *Capitol Hill Hearing*, FED. NEWS SERV., May 1, 2009.

4. See *id.* "It seems pretty clear to me that joining the board of an organization like FREE is actually a much more significant indication of your involvement with the organization and poses, in my mind, very different ethical questions." *Obama Pick for Appeals Court Faces Tough Questioning*, ASSOCIATED PRESS, Apr. 29, 2009, available at <http://www.foxnews.com/politics/>



Senator Feingold's unstated message was: Are you somebody who will decide cases the way I would decide them, or not? This approach bore a strong similarity to Senator Edward Kennedy's 2006 pronouncement on judicial confirmation during the Bush Administration,<sup>5</sup> and to Senator Chuck Schumer's flat declaration at the end of the Supreme Court's 2007 term that failing to mount a successful filibuster of Justice Samuel Alito's nomination to the Supreme Court stood as one of his "greatest failings."<sup>6</sup> He charged that Justice Alito and Chief Justice John G. Roberts, Jr. had reneged on their promises to respect precedent (by which he appeared to mean by not voting with the liberals), and urged that the Senate should presume any future nominees to be unsuitable.<sup>7</sup>

That judicial nominees should make promises to the Senate about the Constitution is a striking idea for a good many reasons, because of course the authors of the Bill of Rights designed it to protect the American public *from* the Senate. The notion that a judicial nominee can obtain confirmation only when the Senate finds what the nominee has to say about the Bill of Rights congruent with its own is deeply problematic.

Why there should be any dispute at all over the principle of impartiality is hard to fathom. Throughout history, the role of judges has been to serve as neutral arbiters of disputes.<sup>8</sup> Inherent in this role is the ideal that judges will shed any preconceptions or opinions of how a matter should be decided before hearing the parties' presentations of fact and law. It is vital to public confidence in the judicial branch that the law play no favorites.

I have thought of two reasons why this ideal is now in dispute. One is that, at a fairly high level of statistical reliability, on high profile questions like the death penalty and abortion, judges in fact often do what they were hired to do.<sup>9</sup>

2009/04/29/obama-pick-appeals-court-faces-tough-questioning. Usually called just FREE, the Foundation for Research on Economics and the Environment enterprise offers seminars on free-market environmentalism to federal judges and others. See FREE, <http://www.free-eco.org> (last visited May 6, 2010).

5. "The result has been the confirmation of two justices, John G. Roberts Jr. and Samuel A. Alito Jr., whose voting record on the court reflects not the neutral, modest judicial philosophy they promised the Judiciary Committee, but an activist's embrace of the administration's political and ideological agenda." Edward M. Kennedy, *Roberts and Alito Misled Us*, WASH. POST, July 30, 2006, at B01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/28/AR2006072801489.html>.

6. Posting of Paul Kane to Capitol Briefing, [http://voices.washingtonpost.com/capitol-briefing/2007/07/schumer\\_regrets\\_no\\_alito\\_filib.html](http://voices.washingtonpost.com/capitol-briefing/2007/07/schumer_regrets_no_alito_filib.html) (July 27, 2007 17:57 EST).

7. *Id.*

8. For a historical discussion of the historical evolution of judicial impartiality, see Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059 (1996).

9. Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1135–37, 1149–51 (1997) (citing various cases, in the face of public outcry, where judges have determined death penalty and abortion cases with unpopular results even when facing retention votes and

Another reason is that part of the country's intellectual class has decided that impartiality is a sham that must be exposed as a cover under which liberal judges ratchet the laws to the left and then demand that conservative judges leave it in place "as precedent."

A new ongoing example illustrating both these causes is gay marriage.<sup>10</sup> Or to take a different field, if in fact the contours of corporate liability for drug warnings will not be made in Congress, the Pennsylvania legislature, nor the Food and Drug Administration, but instead at the supreme courts of Illinois or Wisconsin, then voters decide they should do what they can to affect the outcomes, just as they would have if the real forum was the legislative or executive branch. In the end, this produces a judiciary that behaves like the political branches of the government. It would be a great loss to the American experiment.

## II. THE AGING OF THE BABY BOOM

A second big, dumb trend is the baby boom tidal wave. When the Baby Boomers were five or ten years old, they filled the nation's grade schools to overflowing and prompted massive construction programs and an expansion of the teaching profession. When these same citizens are all sixty or seventy, both nursing homes and courtrooms will likewise be reeling under the pressure of certain expanding dockets. There are ways in which the courts interact with citizens who are towards the end of life, including people in nursing homes for whom there is no known relative. The host of things that happen at the end of life includes estate administration and guardianship. As a committee of the Indiana Judicial Conference recently observed:

The substantial expansion in the number of seniors and the concomitant increase in the number of deaths, increased time will be spent by Indiana Courts on matters arising from the transfer of property due to death. With increase in non-probate forms of wealth transference, the issues formerly addressed in probate proceedings will be raised in litigation related to trusts and property disputes. Increased litigation can be expected as the number of deaths increase due to the disappointed expectations of heirs and expectant beneficiaries and frustrated creditors.<sup>11</sup>

---

pointing out that public education about what courts do, and a strong unified defense of the court by the local members of the bar help judges' maintain judicial independence).

10. The connection between gay rights litigation and the strategies of campaign consultants has been an especially interesting part of this development. See RANDALL T. SHEPARD, *Second Wind for the State Bill of Rights*, in *THE BILL OF RIGHTS IN MODERN AMERICA* 241, 251–52 (David J. Bodenhamer & James W. Ely, Jr. eds., 2d ed. 2008).

11. INDIANA JUDICIAL CENTER PROBATE COMMITTEE, *THE GRAY & THE BLACK: AN EXAMINATION OF THE IMPACT OF AN AGING POPULATION ON THE JUDICIARY AND HOW THE NEEDS OF AN AGING POPULATION MAY BE MET BY THE JUDICIARY* (2008) (on file with the author).



The American court system is not well prepared for this onrushing mass of human drama that is about to wash over it. This will largely happen in state court and not in federal court. We need a great deal more investigation in this field of our work and healthy commitments of imagination. In the places where that is undertaken, most notably and recently in Arizona, the resulting revelations are unhappy ones, but they can lead to important reforms.<sup>12</sup> I am glad to say that the Indiana Judicial Conference is at work devising initiatives in this field.

### III. YET ANOTHER BUDGET CRISIS

A third big dumb trend is what I will call here the decennial budget crisis. The current "Great Recession" represents my third budget crisis as a supreme court justice, deeper than the other two to be sure. The remarkable feature of the collective reactions to the current crisis has been how predictable they have been. One could haul out the speeches and the articles that judges, court administrators, and the rest of the legal profession prepared during the Carter recession (or those from the early 1990s), change the names and the numbers, and readily recognize that the vocabulary of 2010 is largely the same.

We have spoken about the impact of recession on America's courts by emphasizing judicial independence, by worrying about the role of governors in shaping court requests to the legislative branch, by heralding "the Constitution." The solutions we propose at these moments of fiscal distress have likewise not improved much. They tend not to feature general inventiveness. What gets cut first? How many lay-offs will there be? We repeat to ourselves and others that we must protect those processes that represent our constitutional obligations. What that often means is we cancel civil jury trials and conduct criminal trials regardless of the severity of the offenses. This means spending time trying misdemeanors, while the citizens who have been injured in products liability cases stand in line hoping for compensation. We take for granted that the Constitution requires us to give priority to the criminal cases, and thus we push the rest of the litigation to one side.

A change in vocabulary during these regular crises might make a difference, but it will take a huge leap for the American court system to rethink what we do and how we talk about what we are doing if the cause of justice is to be sustained in the third decennial budget crisis. In a few places, bench and bar leaders have developed new dialogues. In Minnesota, the chief justice organized the Coalition to Preserve the Justice System, a group that included representatives like police

---

12. Arizona's first examination of court supervision of probate activity, propelled by "highly publicized cases of mismanagement and financial exploitation of incapacitated and protect persons," led to a statewide program under which fiduciaries must be certified. FIDUCIARY ADVISORY COMMITTEE TO THE ARIZONA JUDICIAL COUNCIL, FINAL REPORT 1 (2001); Chief Justice Rebecca White Berch of Arizona has ordered a review of probate "everything from how the vulnerable are being protected to how much they're being charged for that protection," Laurie Roberts, *Review of Probate Court Ordered*, ARIZ. REPUBLIC, Mar. 26, 2010, at B1, available at <http://www.azcentral.com/arizonarepublic/local/articles/2010/03/25/20100325roberts0326.html>.

and prosecutors. It spelled out what would cease to occur if severe cuts were pushed through (like not trying traffic cases or shoplifting).<sup>13</sup> The Iowa Supreme Court issued a list of furlough days when the courts would close altogether,<sup>14</sup> and the chief justice outlined in a speech to the legislature which court services would no longer be provided (assistance to people without lawyers) and what the effects of shrinking trial time would be (even more plea bargains).<sup>15</sup>

#### IV. COMMUNICATING WITH THE PUBLIC

That leads to the fourth obvious trend: the sea change in information. It but recites the obvious to say that the American court system is way behind other institutions in society on this score.

The Audit Bureau of Circulations reported this spring yet another substantial drop in newspaper circulation in the country.<sup>16</sup> In what seemed like a symbolic event, the owners of *Editor & Publisher* shut it down as a printed magazine at the end of last year.<sup>17</sup> *The Boston Globe* suffered among the most serious losses, and Sumner Redstone,<sup>18</sup> interviewed on this point, said he thought there would be no

---

13. Jay Weiner, *Justice Community: Cutting Budgets for Courts, County Attorneys, and Defenders Is Dangerous*, MINN. POST, Jan. 14, 2009, available at [http://www.minnpost.com/politicalagenda/2009/01/14/5856/justice\\_community\\_cutting\\_budgets\\_for\\_courts\\_county\\_attorneys\\_and\\_defenders\\_is\\_dangerous](http://www.minnpost.com/politicalagenda/2009/01/14/5856/justice_community_cutting_budgets_for_courts_county_attorneys_and_defenders_is_dangerous).

14. Press Release, Iowa Judicial Branch, State Budget Problems Prompt Unpaid Leave for Judges and Court State, and Temporary Court Closures (Nov. 10, 2009) (on file with author). "Iowans will have to settle for 'assembly line justice' because of state budget cuts that forced layoffs while the number of recession-related court cases grows." Grant Schulte, *Iowa's Chief Justice Decries 'Assembly Line Justice' in Wake of Cuts*, DES MOINES REG., Jan. 15, 2010, available at <http://m.desmoinesregister.com/news.jsp?key=585374&rc=ln>. See William M. Welch, *Court Budget Cuts Slow Swift Hand of Justice*, USA TODAY, Apr. 1, 2010, available at [http://www.usatoday.com/news/nation/2010-03-31-court-cuts\\_N.htm](http://www.usatoday.com/news/nation/2010-03-31-court-cuts_N.htm).

15. Marsha Ternus, Chief Justice of the Iowa Supreme Court, 2010 State of the Judiciary, (Jan. 13, 2010), available at <http://www.iowacourts.gov/wfdata/frame9830-1152/file59.pdf>.

16. In the six months ending with March 2010, average daily paid circulation was down 8.7% from the previous year. Mark Fitzgerald, *Like Newspaper Revenue, the Decline in Circ Shows Signs of Slowing*, EDITOR & PUBLISHER, Apr. 26, 2010, available at [http://www.editorandpublisher.com/eandp/news/article\\_display.jsp?vnu\\_content\\_id=1004086334](http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1004086334). That this might be favorable news was due only to the fact that the decline in the previous six months was a little worse.

The Audit Bureau of Circulation reported that in six months ending September 20, 2009, sales fell by 10.6 percent on weekdays and 7.5 percent on Sundays from the period a year earlier. The industry was selling "about 44 million copies a day — fewer than at any time since the 1940's." Richard Perez-Pena, *U.S. Newspaper Circulation Falls 10%*, N.Y. TIMES, Oct. 27, 2009, at B3, available at <http://www.nytimes.com/2009/10/27/business/media/27audit.html>.

17. Frank Ahrens, *Editor & Publisher, Kirkus Reviews to Cease, Nielsen Is Shutting Down Magazine, Selling Others*, WASH. POST, Dec. 11, 2009, at A25, available at [http://www.washingtonpost.com/wp-dyn/content/article/2009/12/10/AR200912103868\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/12/10/AR200912103868_pf.html).

18. Sumner Redstone is the majority owner of National Amusements, Inc. a privately owned



newspapers in ten years.<sup>19</sup>

In the midst of all that, our profession and Congress have committed time to debating whether it would be helpfully transparent for the U.S. Supreme Court to permit television cameras at its hearings.<sup>20</sup> And commentators spilt much ink recently when the Supreme Court countermanded a district judge's plan to broadcast the San Francisco trial about the constitutionality of a vote by Californians to overturn the California Supreme Court's ruling in favor of gay marriage.<sup>21</sup> One can acknowledge that serious people conduct these debates and still hold that they are just not very important.

What is important and difficult for court people (most of whose leaders are at least fifty years old) is coming to grips with the fact that the newest generation procures its information in a dramatically new and different way. Court leaders understand intellectually that this is real but find it difficult to forge effective plans for dealing with it. I see this development as a race in which the most inventive will be well rewarded.

The deterioration of what is usually called the mainstream media or the traditional media has run right alongside development of a powerful role in the marketplace of ideas for two forms of communication that were previously at the margin. One newly stronger player is interest group journalism, where who is down and who is up is plain to see. The number of mainstream newspaper reporters accredited to cover the Congress has fallen twenty-five percent in ten years, and the overall total number of organizations with Capitol Hill credentials declined seventeen percent.<sup>22</sup> Other people are taking their place: observers and writers who represent various voluntary associations and business enterprises that

---

media and entertainment company, which operates more than 1000 movies screens and owns controlling interest in CBS Corporation and Viacom. See National Amusements-Corporate, <http://www.nationalamusements.com/about/corporate/asp> (last visited May 6, 2010); Jenn Abelson, *Redstone Says He Relies on His Instinct*, BOSTON GLOBE, Sept. 19, 2007, at D3, available at [http://www.boston.com/business/globe/articles/2007/09/19/redstone\\_says\\_he\\_relies\\_on\\_his\\_instinct](http://www.boston.com/business/globe/articles/2007/09/19/redstone_says_he_relies_on_his_instinct).

19. Sue Zeidler & Gina Keating, *Redstone Says U.S. on Brink of Bull Market*, REUTERS, available at Apr. 29, 2009, <http://www.reuters.com/article/idUSTRE53S9C520090430>.

20. Posting of Tony Romm to Hillicon Valley, <http://thehill.com/blogs/hillicon-valley/technology/95171-senate-judiciary-committee-advances-legislation-to-compel-scotus-to-televise-proceedings> (Apr. 29, 2010, 15:42 EST).

21. The U.S. Supreme Court was asked to stay a broadcast of a federal trial. Without expressing any view on whether trials should be broadcast, the Court determined the district court below did not follow appropriate procedures set forth in federal law before changing their rule to allow broadcasting. "Courts enforce the requirement of procedural regularity on others, and must follow those requirements themselves." *Hollingsworth v. Perry*, 130 S. Ct. 705, 706 (2010).

22. THE NEW WASHINGTON PRESS CORPS: AS MAINSTREAM MEDIA DECLINE, NICHE AND FOREIGN OUTLETS GROW 5–6 (Pew Research Center's Project for Excellence in Journalism 2009), available at [http://www.journalism.org/sites/journalism.org/files/The\\_Washington\\_Press\\_Corps\\_Report\\_UPDATE.pdf](http://www.journalism.org/sites/journalism.org/files/The_Washington_Press_Corps_Report_UPDATE.pdf).

are a ubiquitous part of American life.<sup>23</sup> This new army of communication (some of them benign and some of them not so benign) has come to the realization that it can be an effective alternative to the traditional news outlets.<sup>24</sup>

If there is no effective Washington bureau of Cleveland's *The Plain Dealer*, Mothers Against Drunk Driving or the National Association of Manufacturers can fill that hole. Fill in the blank, and tune in with your BlackBerry at any hour you like.

The other rising form of information, relatively more important for the legal profession, is what might be called official journalism. Here is the real opportunity for courts to improve access to its message and its processes. It comes as little surprise that a recent study by the Pew Internet & American Life Project calculated that more than a third of Americans use the Internet to access government statistics or that forty percent have downloaded government forms.<sup>25</sup> Much more impressive was the fact that forty-eight percent of Internet users have looked to government websites for information about a public issue or policy.<sup>26</sup> Equally interesting is the finding that among people who use the Internet, whites, blacks, and Latinos are equally likely to use digital technology for accessing information from government.<sup>27</sup>

This is the more important line of inquiry, not whether the U.S. Supreme Court is going to go on television. It is what the system as a whole can do by way of taking advantage of this decline in traditional journalism that is on our doorstep in ways that will help support the work and the values we are assigned to do.

### CONCLUSION

Lawyers as a group are good observers of the larger landscape in which we work. We are not always so adroit at connecting society's trends to the individual cases or matters over which we toil day by day. Spending a little more time connecting these dots should help us improve both the system of justice and our own performance for clients and citizens.

---

23. Staff from U.S. niche publications has increased from twenty-five percent of the total Hill staff to thirty-eight percent in the last ten years. *Id.* at 6, 12.

24. Examples of the new Washington media are publications with names like CLIMATE WIRE, ENERGY TRADER, TRAFFIC WORLD, GOVERNMENT EXECUTIVE and FOOD CHEMICAL NEWS. *Id.* at 13.

25. AARON SMITH, GOVERNMENT ONLINE: THE INTERNET GIVES CITIZENS NEW PATHS TO GOVERNMENT SERVICES AND INFORMATION 4 (Pew Internet & American Life Project 2010), available at [http://www.pewinternet.org/~media/Files/Reports/2010/PIP\\_Government\\_Online\\_2010.pdf](http://www.pewinternet.org/~media/Files/Reports/2010/PIP_Government_Online_2010.pdf).

26. *Id.* at 3.

27. *Id.* at 7-8.



# AN EXAMINATION OF THE INDIANA SUPREME COURT DOCKET, DISPOSITIONS, AND VOTING IN 2009\*

MARK J. CRANDLEY\*\*  
P. JASON STEPHENSON\*\*\*  
JEANINE KERRIDGE\*\*\*\*  
JEFF PEABODY\*\*\*\*\*

In U.S. Supreme Court lore, several justices have been given the mantle of "The Great Dissenter." That title was initially bestowed on the first Justice Harlan<sup>1</sup> for his notable dissent in the notorious *Plessy v. Ferguson*<sup>2</sup> case. The mantle later passed to Justice Oliver Wendell Holmes, whose prolific writing included his dissent in *Lochner v. New York*.<sup>3</sup> In more recent years, the sheer volume of their dissents placed the moniker of "The "Great Dissenter" on the second Justice Harlan,<sup>4</sup> Justice Douglas,<sup>5</sup> and finally Justice Brennan.<sup>6</sup>

Despite this long history of venerating "The Great Dissenters" of the U.S.

---

\* The Tables presented in this Article are patterned after the annual statistics of the U.S. Supreme Court published in the *Harvard Law Review*. An explanation of the origin of these Tables can be found at Louis Henkin, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 301 (1968). The *Harvard Law Review* granted permission for the use of these Tables by the *Indiana Law Review* this year; however, permission for any further reproduction of these Tables must be obtained from the *Harvard Law Review*.

We thank Barnes & Thornburg for its gracious willingness to devote the time, energy, and resources of its law firm to allow a project such as this to be accomplished. As is appropriate, credit for the idea for this project goes to Chief Justice Shepard. Many thanks to Kevin Betz, who initially developed this article and worked hard to bring it to fruition in years past. The authors also must recognize Donald Glick (Mr. Stephenson's father-in-law) who spent Thanksgiving Day writing the spreadsheet that compiled the statistics.

\*\* Partner, Barnes & Thornburg LLP, 2005-present; Assistant Corporation Counsel, City of Indianapolis 2004-05; law clerk for Justice Frank Sullivan, Jr., Indiana Supreme Court, 2000-2001; B.A., 1995, Indiana University; J.D., *summa cum laude*, 2000, Indiana University Maurer School of Law—Bloomington.

\*\*\* Partner, Barnes & Thornburg LLP, 1999-present; B.A., 1996, Taylor University; J.D., 1999, Indiana University School of Law—Indianapolis.

\*\*\*\* Associate, Barnes & Thornburg LLP, 2007-present; B.A., 2000, University of Evansville; J.D., *cum laude*, 2005, Harvard Law School.

\*\*\*\*\* Associate, Barnes & Thornburg LLP, 2008-present; B.A., 2003, University of California, Davis; J.D. *cum laude*, 2008, Indiana University Maurer School of Law—Bloomington.

1. Gabriel J. Chin, *The First Justice Harlan by the Numbers: Just How Great Was "The Great Dissenter?"* 32 AKRON L. REV. 629, 647 (1999).

2. 163 U.S. 537 (1896).

3. 198 U.S. 45, 65-74 (1905) (Holmes, J., dissenting).

4. TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: THE GREAT DISSENTER OF THE WARREN COURT, at viii (1992).

5. Sheri J. Engelken, *Majoritarian Democracy in a Federalist System: The Late Chief Justice Rehnquist and the First Amendment*, 30 HARV. J.L. & PUB. POL'Y 695, 701 (2007).

6. Alex Kozinski, *The Great Dissenter*, N.Y. TIMES ONLINE, July 6, 1997, available at <http://www.nytimes.com/books/97/07/06/reviews/970706.06kozinst.html>.

Supreme Court, the term has never quite applied to any of the justices of the Indiana Supreme Court. A worthy claimant to the title is the late Justice Roger DeBruler, who rightfully could be called a "Great Dissenter" both because of the volume of his work in dissent and because his dissents have been favorably cited in U.S. Supreme Court cases, including the rarity of a lengthy, verbatim quotation of a state court dissent.<sup>7</sup>

But a modern Great Dissenter might be emerging in the form of Justice Rucker. In 2009, Justice Rucker authored dissents in 12 cases, the most of any justice. That total exceeded the number of majority opinions he drafted. Justice Rucker has only accomplished that feat on one prior occasion in the 10 years he has been on the bench, as Justice Rucker also handed down more dissents (15) than majority opinions (7) in 2003. In 2009, he tipped the scales again and handed down 12 dissents and only 10 majority opinions. By contrast, every other justice wrote more than double the number of majority opinions than their dissents in 2009. In fact, Chief Justice Shepard wrote three times as many majority opinions as dissents (18 versus 6), a feat Justice Boehm almost matched (23 versus 8). Indeed, in what may be an example of the exception that proves the rule, since these annual statistics were first compiled, Justice DeBruler had the only other year in which a justice wrote more dissents than majority opinions, as he drafted 19 dissents and 16 majority opinions in 1995. No other justice has done so in Justice Rucker's 10 years on the court.

Justice Rucker's dissenting voice was heard equally in both criminal and civil cases in 2009. He tied Justice Dickson for the most dissents in criminal cases with five and had more dissents in civil cases than any other justice with five. But Justice Rucker's dissents have historically been more frequent in criminal cases. Tracing back through the past five years, he led the court with dissents in criminal cases in every year but 2006. During that same time period, Justice Rucker drafted 24 of the court's 78 dissents in criminal cases, meaning that he was the writing justice for almost a third of the court's criminal dissents in the past five years.

Although it is outside the scope of this Article to address the merits of his dissenting opinions and their impact on the development of Indiana law, the sheer persistency of Justice Rucker as a dissenting voice on the court has some practical consequences. For instance, the frequency of his dissents affects the percentage of agreement between Justice Rucker and the other four justices. For the second year in a row, Justice Rucker did not agree with any other justice in more than 80% of the court's cases. Similarly, because he is so frequently the dissenting voice on the court, he has fewer opportunities to draft the majority opinion. Justice Rucker had authored the fewest majority opinions in every year since 2004, including 2006 when he tied with Chief Justice Shepard. As would be expected in a year when he drafted nearly a third of the court's dissenting opinions, Justice Rucker again authored the fewest majority opinions in 2009, with 10 opinions split evenly between criminal and civil cases.

---

7. See *Schiro v. Farley*, 510 U.S. 222, 237-38 (1994) (Blackmun, J., dissenting); see also *Duckworth v. Eagan*, 492 U.S. 195, 217 (1989).



As a final note, Justice Boehm announced his retirement on May 25, 2010 and 2009 will mark his final full year on the court.<sup>8</sup> Only a law journal article of far broader scope could begin to evaluate Justice Boehm's substantive contribution to the court and the development of Indiana law. His scholarly opinions impacted Indiana law on an incredible breadth of topics with clarity, insight, and flashes of an underappreciated wit uncommon in judicial opinions, including, as just a few examples, the following notable passages:

- [I]f neither of us joins in the result reached by Justice Dickson and the Chief Justice, we have no majority to grant rehearing as to any aspect of the original opinion and Wilkins' thirty-day suspension stands. Lewis Carroll would love that result: half the Court believes no sanction is appropriate, and half would impose a small sanction, so the result is a major penalty. Only those who love the law could explain that to their children. To free parents everywhere from that burden, I concur . . . .<sup>9</sup>
- [The reasonable particularity] test also smuggled in the commonsensical elements of a showing that the information is not readily available elsewhere . . . and that the party seeking it is not engaged in a fishing expedition with no focused idea of the size, species, or edibility of the fish.<sup>10</sup>
- This writer is further removed from high school than his colleagues. But even a casual reviewer of pop culture must view with extreme skepticism the undocumented claim that participants in this broad list of activities are all, or even predominantly, viewed by their peers as role models. . . . I cite the recent motion picture "American Pie II," which I confess to having viewed by reason of friendship with the parents of its director, whom I have known from childhood. I believe most of us could provide more persuasive authority from our own experiences in high school.<sup>11</sup>
- Law enforcement is not baseball and the residence of a fleeing suspect does not constitute a base that is a safe haven from being tagged out.<sup>12</sup>
- Under the trial court's calculations and rationale, a person would violate Indiana Code § 9-30-5-1(a)(2) only if his or her "alcohol

---

8. Jon Murray, *State Court Retirement Opens Door for Diversity*, INDIANAPOLIS STAR, May 26, 2010, at A1.

9. *In re Wilkins*, 782 N.E.2d 985, 988 (Ind. 2003) (Boehm, J., concurring).

10. *WTHR-TV v. Cline*, 693 N.E.2d 1, 7 (Ind. 1998).

11. *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972, 992 & n.4 (Ind. 2002) (Boehm, J. dissenting).

12. *Hardister v. State*, 849 N.E.2d 563, 572 (Ind. 2006).

blood ratio” were 210%, which would long since have produced not an impaired driver but a corpse, indeed one perhaps needing no embalming.<sup>13</sup>

One aspect of Justice Boehm’s legacy that should not be ignored is the sheer volume of his work and the diligence and consistency of his work product. Justice Boehm has authored the most or the second most opinions of any justice in each of the past four years. During that same time period, he handed nearly down 25% of all of the court’s opinions. In 2009 alone, he handed down nearly 24% of the court’s entire caseload while in 2006, he handed down 32 of the court’s 106 opinions, close to a third of the total. Although it is easy to focus on his artful opinions and the quality of his analysis, Justice Boehm’s prodigious body of work certainly has contributed to his legacy on the court.

**Table A.** The court handed down a total of 97 cases in 2009, up one from 2008. Since the effects of the change in the court’s jurisdiction began to be felt in 2003, the court has averaged 101 opinions per year. That number is pulled down slightly by an anomalous year in 2007, in which the court handed down only 78 opinions because of a significant number of particularly difficult cases. Given the experience over the past several years, it is fair to expect the court to hand down around 100 opinions in a given year. Interestingly, this number is more than the average of the U.S. Supreme Court, which typically hands down less than 80 opinions per year despite more Justices, more clerks, and more resources.<sup>14</sup>

The court again handed down more civil cases than criminal cases, as 60% of the court’s opinions came in civil cases. In fact, in the past eight years, civil cases have outnumbered the criminal cases in every year but 2002, 2004, 2005, and 2007.

Justice Boehm authored the most total opinions with 23, which amounted to 24% of all of the court’s opinions. It was a remarkably active year for Justice Boehm, as he also authored the most concurrences (4) and the second most dissents (8).

**Table B-1.** Chief Justice Shepard continues to be a critical swing vote to obtain in civil cases. As this Article has noted in previous years, there is a consistent alignment in civil cases between Chief Justice Shepard and Justices Boehm and Sullivan. In 2009, Chief Justice Shepard agreed with Justice Sullivan in 86.4% of all civil cases, the highest of any two justices for the year. Chief Justice Shepard agreed with Justice Boehm in 81.4% of all cases, the third most of any two justices. Another consistent alignment is between Justices Dickson and

---

13. *Sales v. State*, 723 N.E.2d 416, 421 (Ind. 2000).

14. *The Supreme Court, 2008 Term—The Statistics*, 123 HARV. L. REV. 382, 382 (2009) (78 opinions); *The Supreme Court, 2007 Term—The Statistics*, 122 HARV. L. REV. 516, 516 (2008) (70 opinions); *The Supreme Court, 2006 Term—The Statistics*, 122 HARV. L. REV. 516 (2007) (70 opinions).



Justices Rucker, who had the second most alignment in 2009 at 85% and were the most aligned in 2008.

**Table B-2.** Chief Justice Shepard and Justice Sullivan were the most aligned in criminal cases at 81.8%. But no other pair of justices agreed more than 80% of the time. This marks a contrast to prior years, where the justices generally each agreed more the 80% of criminal cases. Justices Dickson and Rucker agreed in only 65% of the time, the lowest of any pair. Despite their consistent agreement in civil cases, this level of disagreement between Justices Dickson and Rucker appears to be part of a pattern, as the same pair also had the lowest amount of agreement in criminal cases for 2008, 2007, and 2006. In 2009, two other pairs of justices—Justices Boehm and Dickson and Justices Boehm and Sullivan—also exhibited a higher level of disagreement, as they voted the same in barely 70% of cases.

**Table B-3.** Only one pair of justices—Chief Justice Shepard and Justice Sullivan—agreed in more than 80% of all cases. This result was consistent with 2008, when only two pairs of justices agreed in more than 80% of all cases. In 2007, however, all of the justices agreed with all other justices in more than 80% of all cases in 2007.

The lowest agreement between any two justices in all cases was between Justices Sullivan and Rucker. In fact, Justice Sullivan has only agreed with Justice Rucker in more than 80% once in the past five years (2007).

**Table C.** The percentage of unanimous opinions continues to wane. The court was unanimous in 74.4% of cases in 2007, a number that dropped to 62% in 2008. Although the amount rose slightly in 2009 to 63.4%, the total amount of agreement remains below the levels common before the effects of the court's jurisdictional change began to be felt 2003. Of the 34 separate opinions in 2009, only four were concurrences. The total percentage of cases drawing a dissent continues to run in the mid-30s. In 2009, 33.3% of the cases had at least one dissent. That number is down slightly from the 35% in 2008 but still part of an overall increase since the 2005, where the court's cases only drew a dissent in 26.2% of all cases. In 2006, only 23.3% of all cases drew a dissent and in 2007, only 20.5% cases drew a dissent. For the first time in more than five years, the number of dissents in criminal cases outnumbered the dissents in civil cases. In prior years, civil cases were far more likely to draw a dissent. For instance, in 2003 there were three times as many dissents in civil cases than criminal cases, while in 2007 there were two times as many dissents in civil cases.

**Table D.** The percentage of the court's decisions that were split 3-2 dropped to 19% after a spike to 24% in 2008. Despite this drop, the percentage remains higher than in prior years. For instance, the percentage of cases that were split 3-2 were only 12 and 10 in 2007 and 2006, respectively. Not surprisingly given the agreement shown in the earlier tables, Chief Justice Shepard and Justice Sullivan were both in the majority in 11 of the 18 split decisions.

**Table E-1.** The court reversed in only 70.8% of its civil cases. That percentage is down dramatically from 2008 and 2007, where the court reversed in 80% and 93.5% of civil cases, respectively. The percentage of reversals in all cases also dropped in 2009, as the court reversed in 67.4% of all cases. The court reversed in 76% of all cases in 2008, as compared to 78% in 2005, 76.3% in 2006, and 74% in 2007.

**Table E-2.** The number of petitions to transfer dropped again in 2009. After growing steadily for years, the number of petitions dropped in 2008 to 858. That number was almost 100 lower than the number of petitions in 2007 and was the first time since 2004 that fewer than 900 petitions were filed. This past year proved that 2008 was not a fluke, as the number of petitions dropped to 795. The percentage of petitions that the court granted dropped to 8.4%, which was less than the 11% granted in 2008 but more than the 7.2% granted in 2007 and the 7% granted in 2006. Given the decline in petitions for transfer, it bears watching whether that change continues to affect the percentage of cases in which the court grants transfer.

**Table F.** The court's cases continue to cover a broad scope of topics, including 21 different areas of law in 2009. The court handed down seven opinions in death penalty cases in 2009, a high number considering the effort and attention that goes into those cases given the stakes at issue. The court also had a remarkable year in terms of the number of reported writs of mandamus or prohibition. After handing down only one in the previous five years, the court issued seven such writs in 2009.

The 2008 version of this Article predicted that Uniform Commercial Code (UCC) might be an area the court would address in coming years given that the court had not handed an opinion addressing the UCC since 2003, save on case. The court addressed a single UCC case in 2008, but once again left that area of the law for future years in 2009. Given Justice Boehm's impact on corporate governance law, it would not be surprising to see the court address that topic in 2010, particularly given that the court has only handed down two opinions in that area in the past five years.



TABLE A  
OPINIONS<sup>a</sup>

	OPINIONS OF COURT <sup>b</sup>			CONCURRENCES <sup>c</sup>			DISSENTS <sup>d</sup>		
	Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total
Shepard, C.J.	7	11	18	0	1	1	3	3	6
Dickson, J.	8	12	20	0	0	0	4	5	9
Sullivan, J.	9	9	18	0	0	0	4	3	7
Boehm, J.	9	14	23	0	4	4	5	3	8
Rucker, J.	5	5	10	1	0	1	5	7	12
Per Curiam	1	7	8						
Total	39	58	97	1	5	6	21	21	42

<sup>a</sup> These are opinions and votes on opinions by each justice and in per curiam in the 2009 term. The Indiana Supreme Court is unique because it is the only supreme court to assign each case to a justice by a consensus method. Cases are distributed by a consensus of the justices in the majority on each case either by volunteering or nominating writers. The chief justice does not have any power to control the assignments other than as a member of the majority. *See* Melinda Gann Hall, *Opinion Assignment Procedures and Conference Practices in State Supreme Courts*, 73 JUDICATURE 209, 209, 213 (1990). The order of discussion and voting is started by the most junior member of the court and follows reverse seniority. *See id.* at 209, 213.

<sup>b</sup> This is only a counting of full opinions written by each justice. Plurality opinions that announce the judgment of the court are counted as opinions of the court. It includes opinions on civil, criminal, and original actions.

<sup>c</sup> This category includes both written concurrences, joining in written concurrence, and votes to concur in result only.

<sup>d</sup> This category includes both written dissents and votes to dissent without opinion. Opinions concurring in part and dissenting in part or opinions concurring in part only and differing on another issue are counted as dissents.

TABLE B-1  
VOTING ALIGNMENTS FOR CIVIL CASES<sup>e</sup>

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		47	50	47	45
	S		0	1	1	1
	D	---	47	51	48	46
	N		59	59	59	59
	P		79.6%	86.4%	81.4%	78.0%
Dickson, J.	O	47		47	45	47
	S	0		0	2	4
	D	47	---	47	47	51
	N	59		60	60	60
	P	79.6%		78.3%	77.0%	85.0%
Sullivan, J.	O	50	47		46	45
	S	1	0		1	0
	D	51	47	---	47	45
	N	59	60		60	60
	P	86.4%	78.3%		78.3%	75.0%
Boehm, J.	O	47	45	46		45
	S	1	2	1		1
	D	48	47	47	---	46
	N	59	60	60		60
	P	81.4%	77.0%	78.3%		76.7%
Rucker, J.	O	45	47	45	45	
	S	1	4	0	1	
	D	46	51	45	46	---
	N	59	60	60	60	
	P	78.0%	85.0%	75.0%	76.7%	

<sup>e</sup> This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only civil cases. For example, in the top set of numbers for Chief Justice Shepard, 47 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a civil case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

- “O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.
- “S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.
- “D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.
- “N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.
- “P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”



TABLE B-2  
VOTING ALIGNMENTS FOR CRIMINAL CASES<sup>f</sup>

	Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O	33	36	32	31
	S	0	0	0	0
	D	---	36	32	31
	N	44	44	44	44
	P	75.0%	81.8%	72.7%	77.3%
Dickson, J.	O	33	34	30	28
	S	0	0	1	0
	D	33	---	31	28
	N	44	44	44	43
	P	75.0%	77.3%	70.5%	65.0%
Sullivan, J.	O	36	34	31	30
	S	0	0	0	2
	D	36	---	31	32
	N	44	44	44	44
	P	81.8%	77.3%	70.5%	72.7%
Boehm, J.	O	32	31		30
	S	0	0		2
	D	32	31	---	32
	N	44	44		44
	P	72.7%	70.5%	70.5%	72.7%
Rucker, J.	O	31	30	30	
	S	0	2	2	
	D	31	32	32	---
	N	44	44	44	
	P	77.3%	65.0%	72.7%	72.7%

<sup>f</sup> This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only criminal cases. For example, in the top set of numbers for Chief Justice Shepard, 33 is the number of times Chief Justice Shepard and Justice Dickson agreed in a full majority opinion in a criminal case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

- “O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.
- “S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.
- “D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.
- “N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.
- “P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE B-3  
VOTING ALIGNMENTS FOR ALL CASES<sup>g</sup>

		Shepard	Dickson	Sullivan	Boehm	Rucker
Shepard, C.J.	O		80	86	79	76
	S		0	1	1	1
	D	---	80	87	80	77
	N		103	103	103	103
	P		77.7%	84.5%	77.7 %	74.7 %
Dickson, J.	O	80		81	75	75
	S	0		0	3	4
	D	80	---	81	78	79
	N	103		104	104	104
	P	77.7%		77.9%	75.0 %	76.7 %
Sullivan, J.	O	86	81		77	75
	S	1	0		1	2
	D	87	81	---	78	77
	N	103	104		104	104
	P	84.5 %	77.9%		75.0 %	74.0 %
Boehm, J.	O	79	75	77		75
	S	1	3	1		3
	D	80	78	78	---	78
	N	103	104	104		104
	P	77.7%	75.0%	75.0%		75.0 %
Rucker, J.	O	76	75	75	75	
	S	1	4	2	3	
	D	77	79	77	78	--
	N	103	104	104	104	
	P	74.7%	76.7%	74.0 %	75.0%	

<sup>g</sup> This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for all cases. For example, in the top set of numbers for Chief Justice Shepard, 80 is the total number of times Chief Justice Shepard and Justice Dickson agreed in all full majority opinions written by the court in 2009. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of decisions in which the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number of decisions in which the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”



**TABLE C**  
**UNANIMITY**  
**NOT INCLUDING JUDICIAL OR ATTORNEY DISCIPLINE CASES<sup>h</sup>**

Unanimous <sup>i</sup>			Unanimous with Concurrence <sup>j</sup>			Opinions with Dissent			Total
Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total	
24	35	59 (63.4%)	1	2	3 (3.2%)	16	15	31 (33.3%)	93

<sup>h</sup> This Table tracks the number and percent of unanimous opinions among all opinions written. If, for example, only four justices participate and all concur, it is still considered unanimous. It also tracks the percentage of overall opinions with concurrence and overall opinions with dissent.

<sup>i</sup> A decision is considered unanimous only when all justices participating in the case voted to concur in the court’s opinion as well as its judgment. When one or more justices concurred in the result, but not in the opinion, the case is not considered unanimous.

<sup>j</sup> A decision is listed in this column if one or more justices concurred in the result, but not in the opinion of the court or wrote a concurrence, and there were no dissents.

TABLE D  
SPLIT DECISIONS<sup>k</sup>

Justices Constituting the Majority	Number of Opinions <sup>l</sup>
1. Shepard, C.J., Dickson, J., Sullivan, J.	5
2. Shepard, C.J., Sullivan, J., Boehm, J.	5
3. Shepard, C.J., Sullivan, J., Rucker, J.	1
4. Shepard, C.J., Boehm, J., Rucker, J.	1
5. Dickson, J., Sullivan, J., Rucker, J.	1
6. Dickson, J., Boehm, J., Rucker, J.	4
7. Sullivan, J., Boehm, J., Rucker, J.	1
Total <sup>m</sup>	18

<sup>k</sup> This Table concerns only decisions rendered by full opinion. An opinion is counted as a split decision if two or more justices voted to decide the case in a manner different from that of the majority of the court.

<sup>l</sup> This column lists the number of times each group of justices constituted the majority in a split decision.

<sup>m</sup> The 2009 term’s split decisions were:

1. Shepard, C.J., Dickson, J., Sullivan, J.: *Williams v. Tharp*, 914 N.E.2d 756 (Ind. 2009) (Dickson, J.); *Pendergrass v. State*, 913 N.E.2d 703 (Ind. 2009) (Shepard, C.J.); *Bonner v. Daniels*, 907 N.E.2d 516 (Ind. 2009) (Dickson, J.); *Hardley v. State*, 905 N.E.2d 399 (Ind. 2009) (Dickson, J.); *McCullough v. State*, No. 495-0809-CR-508, 2009 Ind. LEXIS 326 (Ind. Feb. 10, 2009) (Dickson, J.).

2. Shepard, C.J., Sullivan, J., Boehm, J.: *McSwane v. Bloomington Hosp. & Healthcare Sys.*, 916 N.E.2d 906 (Ind. 2009) (Shepard, C.J.); *Ind. Dep’t of Revenue v. Kitchin Hospitality, LLC*, 907 N.E.2d 997 (Ind. 2009) (Sullivan, J.); *Stanley v. Walker*, 906 N.E.2d 852 (Ind. 2009) (Sullivan, J.); *Jackson v. Scheible*, 902 N.E.2d 807 (Ind. 2009) (Boehm, J.); *State v. Kimco of Evansville, Inc.*, 902 N.E.2d 206 (Ind. 2009) (Boehm, J.).

3. Shepard, C.J., Sullivan, J., Rucker, J.: *Jensen v. State*, 905 N.E.2d 384 (Ind. 2009) (Rucker, J.).

4. Shepard, C.J., Boehm, J., Rucker, J.: *Tyler v. State*, 903 N.E.2d 463 (Ind. 2009) (Boehm, J.).

5. Dickson, J., Sullivan, J., Rucker, J.: *B.W. & W.G. v. D.B. & J.B.*, 908 N.E.2d 586 (Ind. 2009) (Dickson, J.).

6. Dickson, J., Boehm, J., Rucker, J.: *Holly v. State*, 918 N.E.2d 323 (Ind. 2009) (Rucker, J.); *Myers v. Leedy*, 915 N.E.2d 133 (Ind. 2009) (Rucker, J.); *In re Hawkins*, 902 N.E.2d 231 (Ind. 2009) (per curiam); *Klotz v. Hoyt*, 900 N.E.2d 1 (Ind. 2009) (Dickson, J.).

7. Sullivan, J., Boehm, J., Rucker, J.: *State ex rel. Ind. State Police v. Arnold*, 906 N.E.2d 167 (Ind. 2009) (Sullivan, J.).



**TABLE E-1**  
**DISPOSITION OF CASES REVIEWED BY TRANSFER**  
**AND DIRECT APPEALS<sup>n</sup>**

	Reversed or Vacated <sup>o</sup>	Affirmed	Total
Civil Appeals Accepted for Transfer	34 (70.8%)	14 (29.2%)	48
Direct Civil Appeals	1 (33.3%)	2 (66.7%)	3
Criminal Appeals Accepted for Transfer	22 (71.0%)	9 (29.0%)	31
Direct Criminal Appeals	5 (50.0%)	5 (50.0%)	10
Total	62 (67.4%)	30 (32.6%)	92 <sup>p</sup>

<sup>n</sup> Direct criminal appeals are cases in which the trial court imposed a death sentence. *See* IND. CONST. art. VII, § 4. Thus, direct criminal appeals are those directly from the trial court. A civil appeal may also be direct from the trial court. *See* IND. APP. R. 56, 63 (pursuant to Rules of Procedure for Original Actions). All other Indiana Supreme Court opinions are accepted for transfer from the Indiana Court of Appeals. *See* IND. APP. R. 57.

<sup>o</sup> Generally, the term “vacate” is used by the Indiana Supreme Court when it is reviewing a court of appeals opinion, and the term “reverse” is used when the court overrules a trial court decision. A point to consider in reviewing this Table is that the court technically “vacates” every court of appeals opinion that is accepted for transfer, but may only disagree with a small portion of the reasoning and still agree with the result. *See* IND. APP. R. 58(A). As a practical matter, “reverse” or “vacate” simply represents any action by the court that does not affirm the trial court or court of appeals’s opinion.

<sup>p</sup> This does not include four attorney discipline opinions, three judicial discipline opinions, and one original action. This opinion did not reverse, vacate, or affirm any other court’s decision.

**TABLE E-2**  
**DISPOSITION OF PETITIONS TO TRANSFER**  
**TO SUPREME COURT IN 2009<sup>q</sup>**

	Denied or Dismissed	Granted	Total
Petitions to Transfer			
Civil <sup>r</sup>	201 (86.6%)	31 (13.4%)	232
Criminal <sup>s</sup>	488 (94.%)	31 (6.0%)	519
Juvenile	39 (88.6%)	5 (11.1%)	44
Total	728 (91.6%)	67 (8.4%)	795

<sup>q</sup> This Table analyzes the disposition of petitions to transfer by the court. See IND. APP. R. 58(A).

<sup>r</sup> This also includes petitions to transfer in tax cases and workers' compensation cases.

<sup>s</sup> This also includes petitions to transfer in post-conviction relief cases.



**TABLE F**  
**SUBJECT AREAS OF SELECTED DISPOSITIONS**  
**WITH FULL OPINIONS<sup>t</sup>**

<b>Original Actions</b>	<b>Number</b>
• Certified Questions	0
• Writs of Mandamus or Prohibition	7 <sup>u</sup>
• Attorney Discipline	4 <sup>v</sup>
• Judicial Discipline	3 <sup>w</sup>
<b>Criminal</b>	
• Death Penalty	7 <sup>x</sup>
• Fourth Amendment or Search and Seizure	6 <sup>y</sup>
• Writ of Habeas Corpus	0
Emergency Appeals to the Supreme Court	0
Trusts, Estates, or Probate	2 <sup>z</sup>
Real Estate or Real Property	6 <sup>aa</sup>
Personal Property	0
Landlord-Tenant	1 <sup>bb</sup>
Divorce or Child Support	5 <sup>cc</sup>
Children in Need of Services (CHINS)	5 <sup>dd</sup>
Paternity	2 <sup>ee</sup>
Product Liability or Strict Liability	1 <sup>ff</sup>
Negligence or Personal Injury	11 <sup>gg</sup>
Invasion of Privacy	0
Medical Malpractice	3 <sup>hh</sup>
Indiana Tort Claims Act	3 <sup>ii</sup>
Statute of Limitations or Statute of Repose	2 <sup>jj</sup>
Tax, Department of State Revenue, or State Board of Tax Commissioners	2 <sup>kk</sup>
Contracts	6 <sup>ll</sup>
Corporate Law or the Indiana Business Corporation Law	0
Uniform Commercial Code	0
Banking Law	0
Employment Law	3 <sup>mm</sup>
Insurance Law	7 <sup>nn</sup>
Environmental Law	2 <sup>oo</sup>
Consumer Law	0
Workers' Compensation	0
Arbitration	1 <sup>pp</sup>
Administrative Law	4 <sup>qq</sup>
First Amendment, Open Door Law, or Public Records Law	0
Full Faith and Credit	0
Eleventh Amendment	0
Civil Rights	2 <sup>rr</sup>
Indiana Constitution	21 <sup>ss</sup>

<sup>t</sup> This Table is designed to provide a general idea of the specific subject areas upon which the court ruled or discussed and how many times it did so in 2009. It is also a quick-reference guide to court rulings for practitioners in specific areas of the law. The numbers corresponding to the areas of law reflect the number of cases in which the court substantively discussed legal issues about these subject areas. Also, any attorney discipline case resolved by order (as opposed to an opinion) was not considered in preparing this Table.

<sup>u</sup> *State ex rel. Crain Heating Air Conditioning & Refrigeration, Inc. v. Clark Circuit Court*, 917 N.E.2d 660 (Ind. 2009); *State ex rel. Kirtz v. Delaware Circuit Court No. 5*, 916 N.E.2d 658 (Ind. 2009); *State ex rel. Johnson v. Hamilton Superior Court No. 1*, 915 N.E.2d 975 (Ind. 2009); *State ex rel. Pemberton v. Porter Superior Court No. 4*, 912 N.E.2d 377 (Ind. 2009); *State ex rel. Bousum v. Howard Superior Court No. 2*, 909 N.E.2d 1006 (Ind. 2009); *State ex rel. Seal v. Madison Superior Court No. 3*, 909 N.E.2d 994 (Ind. 2009); *State ex rel. Seal v. Madison Superior Court No. 3*, No. 48S00-0901-OR-32, 2009 Ind. LEXIS 1493 (Ind. Mar. 6, 2009).

<sup>v</sup> *In re Anonymous*, 914 N.E.2d 265 (Ind. 2009); *In re Marshall*, 902 N.E.2d 249 (Ind. 2009); *In re Recker*, 902 N.E.2d 225 (Ind. 2009); *In re Lehman*, 901 N.E.2d 1097 (Ind. 2009).

<sup>w</sup> *In re Felts*, 902 N.E.2d 255 (Ind. 2009); *In re Hawkins*, 902 N.E.2d 231 (Ind. 2009); *In re Scheibenberger*, 899 N.E.2d 649 (Ind. 2009).

<sup>x</sup> *Wilkes v. State*, 917 N.E.2d 675 (Ind. 2009); *Wrinkles v. State*, 915 N.E.2d 963 (Ind. 2009); *Ward v. State*, 908 N.E.2d 595 (Ind. 2009); *Camm v. State*, 908 N.E.2d 215 (Ind. 2009); *Dennis v. State*, 908 N.E.2d 209 (Ind. 2009); *Ward v. State*, 903 N.E.2d 946 (Ind. 2009); *Pruitt v. State*, 903 N.E.2d 899 (Ind. 2009).

<sup>y</sup> *Holly v. State*, 918 N.E.2d 323 (Ind. 2009); *Armfield v. State*, 918 N.E.2d 316 (Ind. 2009); *Jackson v. State*, 908 N.E.2d 1140 (Ind. 2009); *Meredith v. State*, 906 N.E.2d 867 (Ind. 2009); *Bannister v. State*, 904 N.E.2d 1254 (Ind. 2009); *Ward v. State*, 903 N.E.2d 946 (Ind. 2009).

<sup>zz</sup> *In re Estate of Lawrence W. Inlow*, 916 N.E.2d 664 (Ind. 2009); *Estate of Prickett v. Womersley*, 905 N.E.2d 1008 (Ind. 2009).

<sup>aa</sup> *Myers v. Leedy*, 915 N.E.2d 133 (Ind. 2009); *Thomas v. Blackford County Area Bd. of Zoning Appeals*, 907 N.E.2d 988 (Ind. 2009); *Lake County Trust Co. v. Advisory Plan Comm'n of Bachorski*, 904 N.E.2d 1274 (Ind. 2009); *Jackson v. Scheible*, 902 N.E.2d 807 (Ind. 2009); *State v. Kimco of Evansville, Inc.*, 902 N.E.2d 206 (Ind. 2009); *Klotz v. Hoyt*, 900 N.E.2d 1 (Ind. 2009).

<sup>bb</sup> *Klotz v. Hoyt*, 900 N.E.2d 1 (Ind. 2009).

<sup>cc</sup> *Hamilton v. Hamilton*, 914 N.E.2d 747 (Ind. 2009); *Basileh v. Alghusain*, 912 N.E.2d 814 (Ind. 2009); *Rovai v. Rovai*, 912 N.E.2d 374 (Ind. 2009); *Becker v. Becker*, 902 N.E.2d 818 (Ind. 2009); *Clark v. Clark*, 902 N.E.2d 813 (Ind. 2009).

<sup>dd</sup> *T.B. v. Ind. Dep't of Child Servs. (In re M.B.)*, 921 N.E.2d 494 (Ind. 2009); *Pappas v. A.S. (In re J.M.)*, 908 N.E.2d 191 (Ind. 2009); *Ind. Dep't of Child Servs. v. LaPorte Circuit Court (In re T.S.)*, 906 N.E.2d 801 (Ind. 2009); *R.Y. v. Ind. Dep't of Child Servs. (In re G.Y.)*, 904 N.E.2d 1257 (Ind. 2009); *Marion County Div. of Ind. Dep't of Child Servs. v. S. M. (In re H.)*, 904 N.E.2d 203 (Ind. 2009).

<sup>ee</sup> *B.W. v. D.B.*, 908 N.E.2d 586 (Ind. 2009); *In re K.I.*, 903 N.E.2d 453 (Ind. 2009).

<sup>ff</sup> *Kovach v. Caligor Midwest*, 913 N.E.2d 193 (Ind. 2009).

<sup>gg</sup> *Babes Showclub v. Lair*, 918 N.E.2d 308 (Ind. 2009); *Clay City Consol. Sch. Corp. v. Timberman*, 918 N.E.2d 292 (Ind. 2009); *Gary Cmty. Sch. Corp. v. Lolita Roach-Walker & Victor Walker*, 917 N.E.2d 1224 (Ind. 2009); *McSwane v. Bloomington Hospital & Healthcare Sys.*, 916 N.E.2d 906 (Ind. 2009); *Williams v. Tharp*, 914 N.E.2d 756 (Ind. 2009); *Kovach v. Midwest*, 913 N.E.2d 193 (Ind. 2009); *Spar v. Cha*, 907 N.E.2d 974 (Ind. 2009); *Stanley v. Walker*, 906 N.E.2d 852 (Ind. 2009); *Estate of Jerome Mintz v. Conn. Gen. Life Ins. Co.*, 905 N.E.2d 994 (Ind. 2009); *Butler v. Ind. Dep't of Ins.*, 904 N.E.2d 198 (Ind. 2009); *Jackson v. Scheible*, 902 N.E.2d 807 (Ind. 2009).

<sup>hh</sup> *Spar v. Cha*, 907 N.E.2d 974 (Ind. 2009); *Butler v. Ind. Dep't of Ins.*, 904 N.E.2d 198 (Ind. 2009); *Atterholt v. Herbst*, 902 N.E.2d 220 (Ind. 2009).

<sup>ii</sup> *Gary Cmty. Sch. Corp. v. Roach-Walker*, 917 N.E.2d 1224 (Ind. 2009); *Lake County Trust Co. v. Advisory Plan Comm'n*, 904 N.E.2d 1274 (Ind. 2009); *Butler v. Ind. Dep't of Ins.*, 904 N.E.2d 198 (Ind. 2009).

<sup>jj</sup> *City of East Chi. v. East Chi. Second Century, Inc.*, 908 N.E.2d 611 (Ind. 2009); *Cooper Indus. LLC v. South Bend, Ind.*, 899 N.E.2d 1274 (Ind. 2009).

<sup>kk</sup> *Ind. Dep't of Revenue v. Kitchin Hospitality, LLC*, 907 N.E.2d 997 (Ind. 2009); *Miller Brewing Co. v. Ind. Dep't of State Revenue*, 903 N.E.2d 64 (Ind. 2009).



---

<sup>ll</sup> Gunashekar v. Kay Grose, 915 N.E.2d 953 (Ind. 2009); City of East Chicago v. East Chi. Second Century, Inc., 908 N.E.2d 611 (Ind. 2009); Henri v. Curto, 908 N.E.2d 196 (Ind. 2009); N. Ind. Pub. Serv. Co. v. U. S. Steel Corp., 907 N.E.2d 1012 (Ind. 2009); Conwell v. Gray Look Outdoor Mktg. Group, Inc., 906 N.E.2d 805 (Ind. 2009); Zoeller v. East Chi. Second Century, Inc., 904 N.E.2d 213 (Ind. 2009).

<sup>mm</sup> Baker v. Tremco Inc., 917 N.E.2d 650 (Ind. 2009); Filter Specialists, Inc. v. Brooks, 906 N.E.2d 835 (Ind. 2009); Gary Cmty. Sch. Corp. v. Powell, 906 N.E.2d 823 (Ind. 2009).

<sup>nn</sup> Bradshaw v. Chandler, 916 N.E.2d 163 (Ind. 2009); Wagner v. Yates, 912 N.E.2d 805 (Ind. 2009); Tri-etch v. Cincinnati Ins. Co., 909 N.E.2d 997 (Ind. 2009); Bush v. State Farm Mut. Auto. Ins. Co., 905 N.E.2d 1003 (Ind. 2009); Estate of Mintz v. Conn. Gen. Life Ins. Co., 905 N.E.2d 994 (Ind. 2009); Dreaded, Inc. v. St. Paul Guardian Ins. Co., 904 N.E.2d 1267 (Ind. 2009); Atterholt v. Herbst, 902 N.E.2d 220 (Ind. 2009).

<sup>oo</sup> Dreaded, Inc. v. St. Paul Guardian Ins. Co., 904 N.E.2d 1267 (Ind. 2009); Cooper Indus. LLC v. South Bend, Indiana, 899 N.E.2d 1274 (Ind. 2009).

<sup>pp</sup> Lake County Trust Co. v. Advisory Plan Comm'n of Bachorski, 904 N.E.2d 1274 (Ind. 2009).

<sup>qq</sup> N. Ind. Pub. Serv. Co. v. U. S. Steel Corp., 907 N.E.2d 1012 (Ind. 2009); Thomas v. Blackford County Area Bd. of Zoning Appeals, 907 N.E.2d 988 (Ind. 2009); Young v. State, 906 N.E.2d 875 (Ind. 2009); Meredith v. State, 906 N.E.2d 867 (Ind. 2009).

<sup>rr</sup> Bonner v. Daniels, 907 N.E.2d 516 (Ind. 2009); Filter Specialists, Inc. v. Brooks, 906 N.E.2d 835 (Ind. 2009).

<sup>ss</sup> Holly v. State, 918 N.E.2d 323 (Ind. 2009); Armfield v. State, 918 N.E.2d 316 (Ind. 2009); Wilkes v. State, 917 N.E.2d 675 (Ind. 2009); Williams v. Tharp, 914 N.E.2d 756 (Ind. 2009); State v. Hernandez, 910 N.E.2d 213 (Ind. 2009); State v. Pollard, 908 N.E.2d 1145 (Ind. 2009); Jackson v. State, 908 N.E.2d 1140 (Ind. 2009); Mosley v. State, 908 N.E.2d 599 (Ind. 2009); Dennis v. State, 908 N.E.2d 209 (Ind. 2009); Bonner v. Daniels, 907 N.E.2d 516 (Ind. 2009); Meredith v. State, 906 N.E.2d 867 (Ind. 2009); Young v. State, 906 N.E.2d 875 (Ind. 2009); Hayes v. State, 906 N.E.2d 819 (Ind. 2009); State *ex rel.* Ind. State Police v. Arnold, 906 N.E.2d 167 (Ind. 2009); Jensen v. State, 905 N.E.2d 384 (Ind. 2009); Wallace v. State, 905 N.E.2d 371 (Ind. 2009); Ward v. State, 903 N.E.2d 946 (Ind. 2009); Gray v. State, 903 N.E.2d 940 (Ind. 2009); Tyler v. State, 903 N.E.2d 463 (Ind. 2009); Edwards v. State, 902 N.E.2d 821 (Ind. 2009); State v. Kimco of Evansville, Inc., 902 N.E.2d 206 (Ind. 2009); McCullough v. State, No. 49502-0809-CR-5908, 2009 Ind. LEXIS 326 (Ind. Feb. 10, 2009).





# SURVEY OF INDIANA ADMINISTRATIVE LAW

JOSEPH P. ROMPALA \*

Administrative agencies, by nature, perform an array of legislative, executive, and quasi-judicial functions. Because administrative agencies sit at the nexus of the three branches of government, a relatively unique body of law, which preserves the separation of powers while guaranteeing the protection of basic rights, has developed to address the legal questions that arise from the operation of those agencies. For the most part, administrative law principles are well settled in Indiana. The purpose of this Article is to review the application of those administrative law principles by courts to agencies operating in Indiana during the survey period.

## I. JUDICIAL REVIEW

The Indiana Supreme Court recognizes the existence of a constitutional right to judicial review of administrative agencies' decisions.<sup>1</sup> For most agencies, Indiana's Administrative Orders and Procedures Act (AOPA) provides that a court may only grant a party relief from an agency action when the action is:

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.<sup>2</sup>

The Indiana Supreme Court recently held that under this provision, a reviewing court "is limited to consideration of (1) whether there is substantial evidence to support the agency's finding and order and (2) whether the action constitutes an abuse of discretion, is arbitrary, capricious, or in excess of statutory authority."<sup>3</sup>

Although AOPA governs the standard of review for most administrative agencies, it specifically exempts some agencies, such as the Indiana Utility Regulatory Commission (IURC), the Department of Workforce Development, the Department of Revenue, and the Unemployment Insurance Review Board, from its provisions.<sup>4</sup> Nevertheless, the standards of review applied to these exempted agencies are substantially similar to those which govern review of AOPA agencies.

### A. Standard of Review—In General

Courts reviewing an agency action are generally deferential to the

---

\* Associate, Lewis & Kappes, P.C., 2500 One American Square, Indianapolis, Indiana 46282.

1. Ind. Dep't of Highways v. Dixon, 541 N.E.2d 877, 880 (Ind. 1989) (citing State ex rel. State Bd. of Tax Comm'rs v. Marion Superior Court, 392 N.E.2d 1161 (Ind. 1979)).

2. IND. CODE § 4-21.5-5-14(d) (2005).

3. Filter Specialists, Inc. v. Brooks, 906 N.E.2d 835, 844 (Ind. 2009) (citations omitted).

4. IND. CODE § 4-21.5-2-4 (Supp. 2009).

administrative agency in most respects, particularly when it comes to fact finding, the interpretation of statutes the agency is charged with enforcing, and the interpretation of the agency's own rules.<sup>5</sup> In other respects, however, judicial review is less deferential.<sup>6</sup> This disparity means that in some instances the question of which standard of review applies can become a significant issue as each party tries to convince the reviewing court to apply a standard that favors its position.<sup>7</sup> A recent example in which parties took opposing views of the appropriate standard of review is *Northern Indiana Public Service Co. v. United States Steel Corp. (NIPSCO)*.<sup>8</sup>

This case arose from a disagreement between Northern Indiana Public Service Company (NIPSCO) and United States Steel.<sup>9</sup> The companies disagreed about the proper interpretation of pricing terms contained within a contract approved by the IURC as part of a 1999 settlement agreement between the parties.<sup>10</sup> After the dispute arose, U. S. Steel filed a complaint with the IURC seeking enforcement based on its interpretation of the contract.<sup>11</sup> U. S. Steel subsequently filed a motion for summary judgment, and following a hearing, the IURC granted U. S. Steel's motion.<sup>12</sup> NIPSCO appealed to the Indiana Court of Appeals, which applied a *de novo* standard of review and reversed the decision of the IURC.<sup>13</sup> U. S. Steel then sought and was granted transfer to the Indiana Supreme Court.<sup>14</sup>

The supreme court explained that the statute that governs judicial review of IURC decisions sets out a "multiple tiered review."<sup>15</sup> The first level requires that the reviewing court determine "whether there is substantial evidence in light of the whole record to support the Commission's findings of basic fact."<sup>16</sup> The second level of review requires that the order "contain specific findings on all the

---

5. Jennifer Wheeler Terry, *Survey of Administrative Law*, 40 IND. L. REV. 676, 677 (2007).

6. Jennifer Wheeler Terry, *Survey of Indiana Administrative Law*, 42 IND. L. REV. 789, 789 (2009).

7. *Id.*

8. 907 N.E.2d 1012, 1016-17 (Ind. 2009). The author wishes to disclose that his law firm, Lewis & Kappes, P.C., represented U. S. Steel throughout the entire course of litigation in this matter. The author was also personally involved in the drafting of the appellate briefs before the court of appeals and supreme court, and entered an appearance on behalf of U. S. Steel before the state's appellate courts.

9. *Id.* at 1014.

10. *Id.* at 1014-15.

11. *Id.* at 1015.

12. *Id.* Both parties, in fact, filed motions for summary judgment before the IURC.

13. *See* N. Ind. Pub. Serv. Co. v. U. S. Steel Corp., 881 N.E.2d 1065, 1069-71, 1080 (Ind. Ct. App. 2008), *superseded*, 907 N.E.2d 1012 (Ind. 2009).

14. *NIPSCO*, 907 N.E.2d at 1014.

15. *Id.* at 1015-16.

16. *Id.* at 1016 (citing *Citizens Action Coal. of Ind., Inc. v. N. Ind. Pub. Serv. Co.*, 485 N.E.2d 610, 612 (Ind. 1985)).



factual determinations material to its ultimate conclusions.”<sup>17</sup> The supreme court further explained that at this second level, the “judicial task” is to review “conclusions of ultimate facts for reasonableness, the deference of which is based on the amount of expertise exercised by the agency.”<sup>18</sup> The supreme court then explained that when an order addresses an issue within the “special competence” of an agency, reviewing courts should give greater deference to the agency’s determination, while giving less deference to agency orders dealing with matter outside the agency’s competence.<sup>19</sup>

Turning to the contract at issue, the supreme court noted that as part of a regulatory settlement, unlike an agreement between private parties, the contract took on “public interest ramifications” upon its approval by the Commission, which retained its “authority and statutory responsibility to supervise and regulate the Contract.”<sup>20</sup> This meant that the IURC “deployed its expertise” in interpreting the contract, which effectively became its own order, and was, accordingly, due greater deference as “[a]pproving such contracts and resolving disputes revolving around them is intrinsic to the Commission’s regulation of utility rates.”<sup>21</sup>

The court ultimately concluded that the Commission’s interpretation of the contract was a “question falling well within the Commission’s expertise.”<sup>22</sup> The supreme court therefore determined that the question presented was a “mixed question of law and fact with a high level of deference”<sup>23</sup> and determined that it was appropriate to examine the IURC’s interpretation of the contract at the second tier of review.<sup>24</sup> In applying that standard, the court examined the legal conclusions drawn by the IURC, as well as the basis for those conclusions, before ultimately determining that none of the “Commission’s conclusions [ran] afoul of reasonable application of the well-established principles of contract law.”<sup>25</sup> The court thus affirmed the Commission’s order.<sup>26</sup>

### *B. Standard of Review—Summary Judgment*

In addition to examining the appropriate standard of review applicable to agency decisions, the Indiana Supreme Court in *NIPSCO* also addressed the appropriate standard of review courts should apply in reviewing an agency’s

---

17. *Id.* (citing *Citizen Action Coal.*, 485 N.E.2d at 612).

18. *Id.* (citing *McClain v. Review Bd. of the Ind. Dep’t of Workforce Dev.*, 693 N.E.2d 1314, 1317-18 (Ind. 1998)).

19. *Id.*

20. *Id.* at 1017.

21. *Id.* at 1017-18.

22. *Id.* at 1018.

23. *Id.*

24. *See id.*

25. *See id.* at 1018-20.

26. *Id.* at 1020.

summary judgment order.<sup>27</sup> In doing so, the supreme court specifically considered whether it was proper for a court to apply a de novo standard in such a situation.<sup>28</sup>

In addressing that issue, the court explained that an appellate court reviews a trial court's summary judgment order de novo because the "reviewing court faces the same issues that were before the trial court and analyzes them the same way."<sup>29</sup> The supreme court contrasted this standard with the review of an agency's grant of summary judgment, noting that administrative agencies are "not judicial bodies" but are rather "executive branch institutions which the General Assembly has empowered with delegated duties."<sup>30</sup> Because of this distinction between a trial court and an administrative agency, the court concluded that "adjudication by an agency deserves a higher level of deference than a summary judgment order by a trial court falling squarely within the judicial branch."<sup>31</sup> Thus, the supreme court held that it was proper to apply the "established standard of review for judicial review" of an agency action.<sup>32</sup>

### C. Standard of Review—Particular Applications

1. *Arbitrary and Capricious.*—In *Indiana Pesticide Review Board v. Black Diamond Pest & Termite Control, Inc.*,<sup>33</sup> the Indiana Court of Appeals addressed whether certain decisions of the Indiana Pesticide Review Board were arbitrary and capricious.<sup>34</sup> In this case, Black Diamond, its owners (the Duncans), and an employee (Thomas) were all notified by the Office of the Indiana State Chemist that they had violated various pesticide laws and that each of their licenses would be revoked and suspended indefinitely.<sup>35</sup> The affected individuals sought review of the state chemist's decision, only to have the decision affirmed by an ALJ panel, and then the Indiana Pesticide Review Board (IPRB).<sup>36</sup> On judicial review, after initially affirming the IPRB's decision, the trial court granted certain relief to the petitioners.<sup>37</sup> In doing so, the trial court reasoned that the IPRB had misconstrued several statutes, which rendered the IPRB's decision arbitrary and capricious with respect to revoking of the parties' licenses.<sup>38</sup>

---

27. *Id.* at 1018.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. 916 N.E.2d 168 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 548 (Ind. 2009).

34. *Id.* at 179.

35. *Id.* at 171.

36. *Id.*

37. *Id.*

38. *Id.* at 175-78. As the court of appeals thoughtfully clarified, the trial court determined that the state chemist lacked the authority to find that Thomas violated a particular statute, and therefore, could not find Black Diamond or the Duncans in violation of another statute based on



The court of appeals explained that an agency action is arbitrary and capricious if it is “made without any consideration of the facts and lacks any basis that may lead a reasonable person to make the same decision made by the administrative agency.”<sup>39</sup> The court went on to explain that “[s]imply put, an agency decision is arbitrary and capricious where there is no reasonable basis for the decision.”<sup>40</sup> Because the trial court determined that the IPRB acted arbitrarily and capriciously based on a misinterpretation of the relevant statutory provisions, the court of appeals engaged in its own statutory interpretation.<sup>41</sup> In doing so, the court restated the standard of review appropriate for statutory interpretations made by the agency charged with enforcing the statute. That is, the administrative agency’s interpretation is “entitled to great weight, unless that interpretation is inconsistent with the statute itself.”<sup>42</sup> When faced with “two reasonable interpretations of a statute, one of which is supplied by an administrative agency charged with enforcing the statute, the court should defer to the agency.”<sup>43</sup> The court went on to hold that if the agency’s interpretation is reasonable, it should end its analysis and accept the agency’s interpretation.<sup>44</sup>

In *Black Diamond*, the issue was the reasonableness of the IPRB’s interpretation of two former statutes: section 15-3-3.6-14<sup>45</sup> and section 15-3-3.6-16<sup>46</sup> of the Indiana Code.<sup>47</sup> The court concluded that because the provisions fell within the same code chapter, it was a reasonable interpretation that the state chemist had the authority to impose civil penalties (such as revoking a license) for violations of section 16.<sup>48</sup> Because the court determined that the IPRB’s interpretation was reasonable, it ceased its statutory analysis and concluded, based on that interpretation and the evidence presented, that the decision was not arbitrary or capricious.<sup>49</sup>

In an interesting twist on the application of the arbitrary and capricious standard, the court of appeals in *Jennings Water, Inc. v. Office of Environmental*

---

Thomas’s acts. *See id.* at 181.

39. *Id.* at 179 (citing *Ind. State Bd. of Health Adm’rs v. Werner*, 841 N.E.2d 1196, 1206 (Ind. Ct. App. 2006)).

40. *Id.* (citing *Werner*, 841 N.E.2d at 1207).

41. *Id.* at 180-82.

42. *Id.* at 181 (quoting *Ind. Dep’t of Env’tl. Mgmt. v. Boone County Res. Recovery Sys., Inc.*, 803 N.E.2d 267, 273 (Ind. Ct. App. 2004)).

43. *Id.* (quoting *Boone County Res. Recovery Sys., Inc.*, 803 N.E.2d at 273).

44. *Id.* (citing *Boone County Res. Recovery Sys., Inc.*, 803 N.E.2d at 273).

45. IND. CODE § 15-3-3.6-14 (2005) (current version at IND. CODE § 15-16-5-65 (2008)) (authorizing the state chemist to impose civil liability for violating the chapter, including aiding and abetting a person in evading the provision of the chapter).

46. *Id.* § 15-3-3.5-16 (current version at IND. CODE § 15-16-5-70 (2008)) (criminalizing acts that impeded, hindered, or prevented the state chemist in the performance of his or her duties).

47. *Black Diamond Pest & Termite Control, Inc.*, 916 N.E.2d at 181-82.

48. *Id.*

49. *Id.* at 182.

*Adjudication*,<sup>50</sup> struggled with whether a reviewing agency improperly applied an arbitrary and capricious standard.<sup>51</sup> In this case, the Office of Environmental Adjudication (OEA) reviewed an Indiana Department of Environmental Management (IDEM) decision to approve a permit for a “confined feeding operation.”<sup>52</sup> In doing so, the OEA stated that the “issuance [of the permit] was neither arbitrary nor capricious.”<sup>53</sup> This, according to Jennings Water, constituted the imposition of an improper and heightened standard at the administrative level.<sup>54</sup> Although the court of appeals agreed that it would be improper for the reviewing agency to apply an arbitrary and capricious standard, the court concluded, after a full review of the agency’s order, that the OEA had not applied such a standard, but rather, the appropriate *de novo* standard.<sup>55</sup>

2. *Unsupported by Substantial Evidence.*—*Indiana Family and Social Services Administration v. Pickett*<sup>56</sup> addressed whether the Family and Social Services Administration’s (FSSA) denial of Medicaid benefits to Pickett, an individual diagnosed with a number psychiatric disorders, was based on substantial evidence.<sup>57</sup> The court explained that “‘substantial evidence is more than speculation and conjecture’ yet less than a preponderance of evidence.”<sup>58</sup> The court went on to hold that “[s]ubstantial evidence ‘means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’”<sup>59</sup>

In reviewing the FSSA’s determinations, the court examined whether substantial evidence supported the ALJ’s findings.<sup>60</sup> Ultimately, the court concluded that the ALJ did not base its determinations on evidence in the record.<sup>61</sup> To the contrary, the “evidence uniformly supports the conclusion that Pickett’s documented conditions substantially impair his ability to perform labor, services, or engage in a useful occupation,” which the court considered the central inquiry as to Pickett’s eligibility for benefits.<sup>62</sup> Because the “administrative decision did not demonstrate a rational connection between the facts found and the applicable law,” the court ultimately concluded that the FSSA’s determination was unsupported by the evidence, and affirmed the trial

---

50. 909 N.E.2d 1020 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 556 (Ind. 2009).

51. *Id.* at 1023-26.

52. *Id.* at 1021-22.

53. *Id.* at 1025.

54. *Id.* at 1024.

55. *Id.* at 1024-25.

56. 903 N.E.2d 171 (Ind. Ct. App.), *aff’d on reh’g*, 908 N.E.2d 1191 (Ind. Ct. App. 2009).

57. *Id.* at 175.

58. *Id.* at 177 (quoting *Ind. Alcoholic Beverage Comm’n v. River Rd. Lounge, Inc.*, 590 N.E.2d 656, 659 (Ind. Ct. App. 1992)).

59. *Id.* (quoting *River Rd. Lounge*, 590 N.E.2d at 659).

60. *Id.* at 179.

61. *Id.* at 184.

62. *Id.* at 182-84.



court's decision reversing the FFSA's denial of Pickett's Medicaid benefits.<sup>63</sup>

An interesting side note with respect to the decision in *Pickett* was the court's treatment of the ALJ's use of boilerplate language that she had "carefully reviewed the testimony presented at the hearing, all evidence, Federal/State regulations, and policy transmittals in regard to this matter."<sup>64</sup> The FSSA asserted that this language demonstrated that the ALJ had considered all the evidence, and "that just because certain evidence was not noted does not mean it was not considered."<sup>65</sup> The court rebuffed the assertion that this language "could insulate an administrative decision from any evidentiary challenge," noting that allowing it to do so would "eliminate meaningful review no matter how much, if any, evidence was considered."<sup>66</sup>

3. *Statutory Interpretation*.—As noted in the discussion of the *Black Diamond* case, courts are generally deferential to an agency's interpretation of a statute the legislature charges it with enforcing.<sup>67</sup> In *Indiana Department of Revenue v. Kitchin Hospitality, LLC*,<sup>68</sup> the Indiana Supreme Court confronted an issue of somewhat competing statutory interpretations by the State Department of Revenue and the Indiana Tax Court—both bodies that possess expertise in the application of Indiana's tax laws.<sup>69</sup>

*Kitchin Hospitality* involved consideration of whether a law exempting hotels from paying sales tax on "tangible personal property" extended to the hotel's purchase of utilities.<sup>70</sup> The Department of Revenue argued that exemption did not apply because the hotel, not hotel guests, consumed the utilities.<sup>71</sup> The tax court interpreted the exemption to apply to utilities consumed in a hotel's guest rooms, but not in common areas.<sup>72</sup> In a 3-2 decision, the supreme court ultimately sided with the Department of Revenue and concluded that this was an inaccurate interpretation.<sup>73</sup>

The court held that the statutory exemption required the property be used "during occupation of the rooms" and be consumed by the guest.<sup>74</sup> The court explained that it based its decision on a number of factors.<sup>75</sup> First, the tax court's interpretation could lead to exemptions for a wide variety of items that guests did not actually use. Second, other provisions of the statute indicated that the General Assembly intended to exempt only items actually used by hotel guests

---

63. *Id.* at 183-84.

64. *Id.* at 175.

65. *Id.*

66. *Id.* at 175 n.5

67. *See supra* Part I.C.1.

68. 907 N.E.2d 997 (Ind. 2009).

69. *Id.* at 1001.

70. *Id.* at 998.

71. *Id.* at 1001.

72. *Id.* at 999.

73. *Id.* at 1001-03.

74. *Id.* at 1001-02.

75. *Id.* at 1002.

during their stay.<sup>76</sup> The court also considered later amendments to the statute, which expressly excluded utilities from the exemption, to be evidence of the General Assembly's intention to express its original intent more clearly.<sup>77</sup>

Interestingly, although the majority asserted that this interpretation of the statute was in line with the deference typically given to an administrative agency charged with enforcing a statute,<sup>78</sup> the dissent disagreed.<sup>79</sup> Justice Dickson instead asserted that the court should defer to the tax court, which the legislature "created 'to consolidate tax-related litigation in one court of expertise.'"<sup>80</sup> This split on the Indiana Supreme Court exposes an intriguing dilemma that can arise when two adjudicative bodies share competence over the same area, and yet interpret the law in that area differently: Specifically, to whose expertise does the court defer?

#### *D. Subject Matter Jurisdiction or Procedural Defect?*

1. *Exhaustion of Administrative Remedies.*—The Indiana Supreme Court has consistently held that in most circumstances if a party is required to exhaust available administrative remedies and fails to do so, a reviewing court is "completely ousted" of subject matter jurisdiction to hear the case.<sup>81</sup> Exceptions to this rule exist, however, and in some cases, questions can arise whether a party has exhausted its administrative remedies or if it is required to do so.

One decision during the survey period that addressed the exhaustion requirement was *LHT Capital, LLC v. Indiana Horse Racing Commission*.<sup>82</sup> Last year's survey Article extensively addressed the original decision in this matter,<sup>83</sup> but LHT sought rehearing of the court of appeals' decision that it had failed to exhaust its administrative remedies before seeking review of the racing commission's imposition of a transfer fee.<sup>84</sup> LHT sought rehearing on a number of theories, including a contention that the court of appeals misapplied an exception to the exhaustion requirement that exists when a party challenges the legality or constitutionality of the statute or regulation at issue.<sup>85</sup>

On rehearing, the court of appeals explained that LHT's position, which amounted to a claim that a party does not need to exhaust its administrative remedies anytime it challenges a statute or regulation as void, was "simply not

---

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 1003 (Dickson, J., dissenting).

80. *Id.* (Dickson, J., dissenting) (quoting *State v. Sproles*, 672 N.E.2d 1353, 1357 (Ind. 1996)).

81. See *Austin Lakes Joint Venture v. Avon Utils., Inc.*, 648 N.E.2d 641, 644 (Ind. 1995).

82. 895 N.E.2d 124 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 982 (Ind. 2009).

83. See *Terry*, *supra* note 6, at 798-99.

84. *LHT Capital, LLC*, 895 N.E.2d at 125.

85. *Id.* at 126-27.



the case.”<sup>86</sup> Instead, the court of appeals explained that Indiana courts had consistently determined that the exception did not always apply.<sup>87</sup> In doing so, the court of appeals cited to a number of cases including *Indiana Department of Environmental Management v. Twin Eagle, LLC*,<sup>88</sup> and *Johnson v. Celebration Fireworks, Inc.*<sup>89</sup> *Celebration Fireworks, Inc.* held that even if a challenge were made to the validity of a statute or regulation, exhaustion might still be required in order to resolve the case without “confronting broader legal issues.”<sup>90</sup> The court restated a portion of its prior holding that LHT’s actions before the racing commission, particularly negotiating and accepting a settlement, accomplished that very end, and prevented the company from litigating the constitutionality of the commission’s rule.<sup>91</sup>

In *Jacobsville Developers East, LLC v. Warrick County*,<sup>92</sup> the court of appeals addressed whether a party was required to complete a certiorari action in order to exhaust its administrative remedies. In that case, Jacobsville Developers filed an application in 2007 with the Warrick County Area Planning Commission for approval of a two-lot subdivision.<sup>93</sup> The plat proposed by Jacobsville Developers was rejected because the county’s subdivision control ordinance required that developers designate a portion of the land, which the plat designated a setback, as a right-of-way.<sup>94</sup> The developer then filed a certiorari action with the local circuit court, based in part on the assertion that the denial of the proposed plat constituted an unconstitutional taking without just compensation.<sup>95</sup> Before that action concluded, however, the parties agreed to dismiss the matter.<sup>96</sup>

Shortly after agreeing to dismiss the pending certiorari action, the developer filed a second application for approval of a plat, this time including a dedicated right-of-way.<sup>97</sup> After the area planning commission approved the second application, Jacobsville Developers filed an inverse condemnation action alleging that the local ordinance constituted an unconstitutional taking.<sup>98</sup> The trial court dismissed the complaint for lack of subject matter jurisdiction because Jacobsville Developers had failed to exhaust its administrative remedies.<sup>99</sup> On

---

86. *Id.* at 127.

87. *Id.*

88. 798 N.E.2d 839 (Ind. 2003).

89. 829 N.E.2d 979 (Ind. 2005).

90. *LHT Capital, LLC*, 895 N.E.2d at 127-28 (quoting *Celebration Fireworks Inc.*, 829 N.E.2d at 982).

91. *Id.* at 128-29.

92. 905 N.E.2d 1034 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 548 (Ind. 2009).

93. *Id.* at 1037.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

appeal, Jacobsville Developers argued that the trial court erred because it had exhausted the available remedies within the agency and was therefore not required to complete the certiorari process before filing its inverse condemnation action.<sup>100</sup>

Quoting from the U.S. Supreme Court decision in *Williamson County Regional Planning Commission v. Hamilton Bank*,<sup>101</sup> the Indiana Court of Appeals noted that the exhaustion requirement refers to *both* the administrative and judicial procedures available to an aggrieved party and that by dismissing the certiorari action, Jacobsville Developers had failed to exhaust its administrative remedies.<sup>102</sup> The court also considered whether the developer's failure to exhaust its administrative remedies fit within the futility exception to the exhaustion requirement. Specifically, the court of appeals considered whether the certiorari process could have provided Jacobsville Developers with the type of relief it sought in that proceeding.<sup>103</sup>

Relying on the applicable Indiana statutory law and Seventh Circuit case law, the court of appeals noted that certiorari courts lack the authority to provide compensatory relief, but instead, can only "pass on the legality of the area plan commission's action by affirming, modifying, or reversing the action."<sup>104</sup> The court thus concluded that if the developer sought compensation in its certiorari action, then its voluntary dismissal of that action would not result in a failure to exhaust its administrative remedies.<sup>105</sup> But the court determined that in the certiorari action the developer's claim was one for excessive exaction, in which it sought to avoid a land-use decision that conditioned approval of a development on the dedication of the property to a public use.<sup>106</sup> As such, the developer was not seeking compensation but rather exactly the sort of relief that the certiorari process could provide, and the court of appeals concluded that the process would not have been futile.<sup>107</sup>

2. *Compliance with Statutory Procedures.*—AOPA and other administrative statutes contain provisions that require a party seeking judicial review of an agency action to comply with certain procedures.<sup>108</sup> During the survey period, several cases addressed whether a party's failure to comply with those procedures prevented judicial review of an agency action.

In *Reedus v. Indiana Department of Workforce Development*,<sup>109</sup> the court of

---

100. *Id.* at 1038.

101. 473 U.S. 172 (1985).

102. *Jacobsville Developers*, 905 N.E.2d at 1041 (quoting *Williamson County*, 473 U.S. at 193).

103. *Id.* at 1039.

104. *Id.*

105. *Id.*

106. *Id.* at 1039-40 (quoting *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999)).

107. *Id.* at 1040.

108. See, e.g., IND. CODE §§ 4-21.5-5-3 (standing), -4 (exhaustion of remedies), -5 (timing).

109. 900 N.E.2d 481 (Ind. Ct. App. 2009).



appeals considered whether a trial court properly dismissed a case based on the petitioner's failure to timely file the complete certified agency record as required by Indiana section 4-21.5-5-13.<sup>110</sup> In addressing that question, the court of appeals first reviewed the historical treatment of such failures in Indiana's Courts of Appeals. In doing so, the court of appeals took note of what it considered a dramatic change in the common law away from considering such defects to deprive a court of subject matter jurisdiction, to a view that such defects were merely procedural in nature.<sup>111</sup>

The court of appeals then acknowledged what it called "somewhat divergent views" on how to treat a petitioner's failure to file statutorily designated materials.<sup>112</sup> After reviewing several cases, the court turned to the language of Indiana Code section 4-21.4-5-13 which requires the timely filing of the "agency's orders, the documents upon which the agency relied in issuing the orders, and 'any other material described in this article as the agency record for the type of agency action at issue.'"<sup>113</sup> The court focused on this last phrase, "the agency record for the type of agency action at issue" and held that it revealed that the General Assembly understood that "not everything [statutorily defined as the agency record] would necessarily exist or be relevant to the disputed action."<sup>114</sup> In addition, the court noted that section 4-21.5-5-13(b) provides only that the failure to file timely the agency record "is cause for dismissal."<sup>115</sup> The court of appeals concluded that the use of this permissive, rather than mandatory, language was evidence that the General Assembly "inten[ded] to allow the trial court some leeway in deciding whether to dismiss an appeal."<sup>116</sup> The court also noted that a "hyper-formalistic" filing requirement could create due process concerns and leave the door open for agencies to be "intentionally slow and uncooperative in producing a complete record, in hopes of securing a dismissal."<sup>117</sup>

The court of appeals concluded that it would be wasteful to require the filing of irrelevant materials, but it ultimately upheld the trial court's dismissal of the petition because Reedus only asserted that the administrative agency's action was "unsupported by substantial evidence."<sup>118</sup> Because the ALJ relied on the transcript of the proceedings in reaching his decision, the court of appeals

---

110. *See id.* at 482-83. Instead, the petitioner filed uncertified copies of four relevant documents to the petition for review. *Id.* at 483.

111. *See id.* at 485-87. The significance of this shift is important. If a trial court were to lack subject matter jurisdiction because of a defect in the process of filing for review, it could not properly review the matter. On the other hand, if the defect is "procedural," a court would still be vested with the authority to act, as the opposing party could waive a challenge to the defect.

112. *Id.* at 485-86.

113. *Id.* at 487 (quoting IND. CODE § 4-21.5-5.13(a)(1-3) (2005)).

114. *Id.*

115. *Id.* (quoting IND. CODE § 4-21.5-5-13(b)).

116. *Id.*

117. *Id.* at 487-88.

118. *Id.* at 488.

concluded that the filing of transcript was “explicitly required” by AOPA, and therefore failure to make that filing rendered the petition inadequate.<sup>119</sup>

In another case, *Evans v. State*,<sup>120</sup> the court of appeals addressed whether the failure to serve the “ultimate authority issuing the order” with the petition for review, as required by Indiana Code section 4-21.5-5-8 deprived the reviewing court of subject matter jurisdiction.<sup>121</sup> In that case, Evans, after the Indiana Family and Social Services Administration denied her Medicaid coverage, sought judicial review.<sup>122</sup> Although Evans served the attorney general, she failed to serve the head of the FSSA and instead served the governor.<sup>123</sup>

Citing Indiana Supreme Court decisions *K.S. v. State*<sup>124</sup> and *Packard v. Shoopman*,<sup>125</sup> the court of appeals concluded that the improper service “should be viewed as a procedural defect, not jurisdictional.”<sup>126</sup> The court of appeals then concluded that the defective service was “not fatal” because the method of service had been reasonably calculated to notify the FSSA of the suit, and because the FSSA had actual notice of the suit, evidenced by the attorney general’s office entering an appearance on behalf of the FSSA.<sup>127</sup> Accordingly, the court of appeals reversed the dismissal.<sup>128</sup>

In an interesting counterpoint to the decisions in *Reedus* and *Evans*, the court of appeals in *Benton County Remonstrators v. Board of Zoning Appeals*<sup>129</sup> considered whether a petition for review from a decision of the local Board of Zoning Appeals (BZA) was procedurally sufficient.<sup>130</sup> The court first looked at the question of whether the petition, verified by an attorney, was properly verified under Indiana Code section 36-7-4-1003(a).<sup>131</sup> The court of appeals noted that the Indiana Supreme Court had previously concluded that Indiana Trial Rule 11(B) sets the standard necessary for verification of petitions for review of administrative agencies like a BZA.<sup>132</sup> The court then determined that because an attorney could form the requisite belief as to the truth of the representations, as required by Rule 11(B), the attorney’s verification was sufficient.<sup>133</sup>

---

119. *Id.*

120. 908 N.E.2d 1254 (Ind. Ct. App. 2009), *reh’g denied*, No. 21A01-0903-CV-152, 2009 Ind. App. LEXIS 1639 (Ind. Ct. App. Sept. 15, 2009).

121. *See id.* at 1256-57.

122. *Id.* at 1256.

123. *Id.* at 1257.

124. 849 N.E.2d 538 (Ind. 2006) (describing subject matter jurisdiction generally).

125. 852 N.E.2d 927, 931-32 (Ind. 2006) (holding “the timeliness of filing does not affect the subject matter jurisdiction of the Tax Court”).

126. *Evans*, 908 N.E.2d at 1257.

127. *Id.* at 1257-59.

128. *Id.* at 1259.

129. 905 N.E.2d 1090 (Ind. Ct. App. 2009).

130. *See id.* at 1093.

131. *Id.* at 1094-95.

132. *Id.* at 1095.

133. *Id.*



On the other hand, however, the court of appeals determined that the petitioners' failure to serve notice on all affected landowners, as required by statute, justified dismissal of the petition with respect to those landowners.<sup>134</sup> In doing so, the court relied on statements in the Indiana Supreme Court's decision in *Bagnall v. Town of Beverly Shores*,<sup>135</sup> which noted that strict compliance with the statute authorizing review of BZA decisions was necessary to vest jurisdiction in a trial court.<sup>136</sup>

Although *Reedus*, *Evans*, and *Benton County* all suggest that courts may exercise some lenience with regard to compliance with filing requirements in seeking judicial review, that lenience should not be considered absolute. For example, in *Marchand v. Review Board of the Indiana Department of Workforce Development*,<sup>137</sup> the court of appeals dismissed an appeal because the appellant did not file her notice of appeal until roughly three months after the Department issued its final order.<sup>138</sup>

#### *E. Supplementing the Agency Record*

Generally, parties cannot supplement the agency record during judicial review.<sup>139</sup> The decision in *Edward Rose of Indiana, LLC, v. Metropolitan Board of Zoning Appeals*,<sup>140</sup> provided valuable insight into some of the circumstances under which the record may, and may not, be supplemented.

In that case, the court of appeals reviewed the decision of a trial court in a certiorari petition seeking relief from a BZA decision denying Edward Rose a variance to display a large sign on the premises of its apartment complex.<sup>141</sup> During the certiorari proceeding, the trial court, although expressing misgivings about doing so, allowed Edward Rose to provide significant supplemental evidence on the three statutory criteria necessary to obtain a variance.<sup>142</sup> Based on this evidence, the trial court reversed the BZA on two of the three statutory criteria but upheld the BZA's determination as to the last criteria.<sup>143</sup>

Before addressing Edward Rose's argument, the court of appeals chose to

---

134. *Id.* at 1098-99.

135. 726 N.E.2d 782, 786 (Ind. 2000).

136. *Benton County Remonstrators*, 905 N.E.2d at 1098-99 (citing *Bagnall*, 726 N.E.2d at 785).

137. 905 N.E.2d 435 (Ind. Ct. App. 2009).

138. *Id.* at 438-39.

139. *See, e.g.*, IND. CODE § 4-21.5-5-12 (2005).

140. 907 N.E.2d 598 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 553 (Ind. 2009).

141. *Id.* at 600.

142. *See id.* at 601-03 (stating that the court received the testimony of a land use developer, three Edward Rose employees, and additional documentary evidence); *see also id.* at 603 (quoting from transcript of the proceedings before the trial court in which judge asked that by receiving supplemental evidence, "[A]ren't we opening ourselves up potentially for problems?").

143. *Id.* at 601.

“comment on” the trial court’s decision to receive additional evidence.<sup>144</sup> The court noted that under the applicable statute, the certiorari proceeding was limited to a determination of the legality of the BZA’s decision but that the trial court could take additional testimony if it determined it was necessary to do so in order to pass on that issue; however, “the review may not be by trial de novo.”<sup>145</sup>

The court of appeals held that the “trial court’s instincts [were] correct” in expressing its misgivings over admitting the evidence, and explained that doing so did not comport with the historical function of the certiorari process, which was to provide a means of relief when an “inferior tribunal either exceeded its jurisdiction or proceeded illegally and there was no other method for reviewing such proceedings.”<sup>146</sup> The court then indicated that it is hard to conclude that a trial court acted according to Indiana Code section 36-7-4-1009 when it considered evidence the parties did not even present to the BZA.<sup>147</sup> Rather, the court remarked that consideration of such evidence could be “more accurately described as conducting a trial de novo.”<sup>148</sup> Because the trial court based its determinations on the new evidence, the court of appeals concluded that the supplementation of the record was “inconsistent with certiorari review under Indiana Code section 36-7-4-1009.”

The court then provided a “non-exhaustive list of instances where the trial court may properly consider supplemental evidence, while at the same time avoiding a trial de novo.”<sup>149</sup> This list included: an incomplete record because the aggrieved party was denied an opportunity to be heard or evidence was excluded; when “good and sufficient” cause was shown as to why the evidence was not offered before the BZA; when the record does not contain all the evidence presented; when the record of the hearing is insufficient to determine the merits of the appeal; when new evidence is discovered after the hearing; and when the evidence is “probative of whether the BZA members violated the Indiana Open Door Law.”<sup>150</sup>

#### *F. Availability of Judicial Review*

Most state agencies are subject to judicial review, but not all. In *Hayes v. Trustees of Indiana University*,<sup>151</sup> the court of appeals considered whether a former employee of Indiana University had access to judicial review following her termination during a “reduction in force.”<sup>152</sup> In addressing the question, the

---

144. *Id.* at 602.

145. *Id.* (quoting IND. CODE § 36-7-4-1009 (2007)).

146. *Id.* at 603.

147. *Id.*

148. *Id.* at 603-04.

149. *Id.*

150. *Id.*

151. 902 N.E.2d 303 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 551 (Ind. 2009).

152. *Id.* at 306, 314-15.



court looked to the Indiana Supreme Court's decision in *Blanck v. Indiana Department of Corrections*.<sup>153</sup> As the court of appeals explained, Blanck had sought judicial review of a disciplinary action taken against him by the Department of Corrections.<sup>154</sup> Although the supreme court in *Blanck* held that AOPA provided the exclusive means of review for actions like those taken by the Department of Corrections, it nevertheless determined that because the General Assembly had deliberately excluded review of such actions under the provisions of AOPA, the clear intent was to “deny to inmates charged with or found guilty of misconduct the procedure specified in the AOPA, including judicial review.”<sup>155</sup>

The court found the situation in *Blanck* analogous to that before it because in both instances, the General Assembly had excluded the relevant authority, or particular agency action, from the provisions of AOPA.<sup>156</sup> Thus, the court determined that the General Assembly's intent was to exclude the actions of Indiana University from judicial review.<sup>157</sup>

## II. AGENCY ACTIONS

This section of this Article examines cases that fall outside of “traditional” issues of judicial review and instead relate to issues such as agency authority and the conduct of proceedings before an administrative agency.

### A. Scope of Agency Action

As statutory bodies, administrative agencies are generally limited only to those powers explicitly granted to them by statute. In some instances, then, questions can arise whether an agency has the authority to take a particular action. Such was the case in *Ghosh v. Indiana State Ethics Commission*.<sup>158</sup> That case involved a former employee of IDEM who the agency terminated for violating the state's ethics code.<sup>159</sup> After his dismissal, Ghosh appealed the decision to the State Employee Appeals Commission where the ALJ found that

---

153. 829 N.E.2d 505 (Ind. 2005).

154. *Hayes*, 902 N.E.2d at 314.

155. *Id.* at 314-15 (quoting *Blanck*, 829 N.E.2d at 510).

156. *Id.* at 315. The specific exemption from AOPA for state educational institutions is located in Indiana Code section 4-21.5-2-4(a)(3). The exemption for agency actions “related to an offender within the jurisdiction of the department of correction,” which was at issue in *Blanck*, is located in section 4-21.5-2-5(6).

157. *Hayes*, 902 N.E.2d at 315.

158. 911 N.E.2d 137 (Ind. Ct. App.), *trans. granted, opinion vacated*, 919 N.E.2d 556 (Ind. 2009). The Indiana Supreme Court granted transfer in this case on October 29, 2009. The court held oral arguments on December 17, 2009, but it has not rendered a decision as of March 3, 2010. The Indiana Law Blog, [http://indianalawblog.com/archives/2009/12/ind\\_decisions\\_u\\_132.html](http://indianalawblog.com/archives/2009/12/ind_decisions_u_132.html) (Dec. 7, 2009, 5:30 EST).

159. *Ghosh*, 911 N.E.2d at 139.

the agency should reinstate him.<sup>160</sup> The Commission, however, declined to follow the ALJ's recommendation and affirmed the termination of Ghosh's employment.<sup>161</sup> Ghosh sought judicial review of that decision with the court of appeals, but the court of appeals dismissed the matter when he failed to timely file the agency record.<sup>162</sup>

While Ghosh was appealing his dismissal, the State Ethics Commission learned of his actions and initiated its own investigation, which led it to find that he had violated the State Ethics Code and ordered him to reimburse the State as a sanction.<sup>163</sup> Ghosh then sought judicial review of the Ethics Commission's determination, seeking reinstatement of his employment.<sup>164</sup> The trial court, however, determined that Ghosh was collaterally estopped from seeking reinstatement because that matter had already been litigated before IDEM and the Appeals Commission.<sup>165</sup> The question before the court of appeals thus became whether "IDEM had authority to dismiss Ghosh for a violation of the Ethics Code and, if so, whether the Appeals Commission had authority to review such a dismissal."<sup>166</sup>

The court of appeals then engaged in statutory interpretation of several sections of the State Personal Act to determine whether IDEM and the Appeals Commission had the authority they respectively exercised in discharging Ghosh and in reviewing that decision.<sup>167</sup> In reviewing Indiana Code section 34-15-2-34, which grants an "appointing authority" the power to dismiss a "regular employee" for cause, the court determined that there was no dispute that IDEM and Ghosh fit those respective definitions.<sup>168</sup> The court also determined that although the State Personal Act did specifically define "for cause," there was "authority for the proposition that dismissals for cause nevertheless encompass a broad range of dismissals, including those that are accurately described as ethical violations."<sup>169</sup> This broad definition of "for cause" was sufficient for the court to conclude that the General Assembly had not intended to prohibit an "appointing authority" like IDEM from discharging an employee for a violation of the ethics code.<sup>170</sup> The court then concluded that given the statutory procedure established to review dismissal for violations of the ethics code, it "goes without saying that the legislature plainly intended to give the Appeals Commission jurisdiction over administrative appeals from such dismissals."<sup>171</sup> Based on its

---

160. *Id.* at 139-40.

161. *Id.* at 140.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 141.

166. *Id.*

167. *Id.* at 142-44.

168. *Id.* at 142 (citing IND. CODE §§ 4-15-2-2.1, -3.7 (2005)).

169. *Id.* at 144 (citations omitted).

170. *Id.*

171. *Id.*



conclusion that both agencies had the authority to take the actions they did, the court of appeals ultimately held that the trial court properly concluded that Ghosh was collaterally estopped from litigating his dismissal during review of the Ethics Commission proceeding.<sup>172</sup>

### B. Due Process

Administrative agencies exercise not only legislative and executive powers, but in many instances, the law also vests them with quasi-judicial powers. As such, many of the rights available to litigants in a traditional judicial setting are also available to persons involved in administrative proceedings. Among these rights is due process, which Indiana's courts have held requires at least notice and an opportunity to be heard.<sup>173</sup> In at least two instances during the survey period, Indiana courts addressed whether a party to an administrative proceeding had received sufficient notice to satisfy due process requirements.<sup>174</sup>

In *Art Hill*, the court of appeals addressed whether an employer was denied due process during an unemployment compensation hearing.<sup>175</sup> In that matter, Art Hill, Inc., discharged an employee who was initially denied unemployment benefits after determining the discharge was for just cause.<sup>176</sup> The employee appealed, and the presiding ALJ sent notice of the hearing to both the employee and Art Hill.<sup>177</sup> Both subsequently notified the ALJ of a telephone number where they could reach them at the time of the hearing.<sup>178</sup> At the time of the hearing, however, the ALJ attempted several times to contact Art Hill at the number provided, but was unsuccessful.<sup>179</sup> The ALJ thus entered findings of fact and conclusions of law to the effect that Art Hill had failed to present evidence sufficient to meet its statutory burden that the employee was discharged for just cause.<sup>180</sup> Art Hill appealed to the full review board, which approved the ALJ's decision.<sup>181</sup>

On judicial review to the court of appeals, the court compared the situation to those in which a party had notice of a hearing but failed to appear without explanation or justification.<sup>182</sup> The court found that there was "no justification for treating the right to be present at an unemployment hearing any differently

---

172. *Id.* at 145.

173. *See, e.g., Art Hill, Inc. v. Bd. of Ind. Dep't of Workforce Dev.*, 898 N.E.2d 363, 367 (Ind. Ct. App. 2008).

174. *See Forni v. Review Bd. of the Ind. Dep't of Workforce Dev.*, 900 N.E.2d 71, 72-73 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 988 (Ind. 2009); *Art Hill, Inc.*, 898 N.E.2d at 367-68.

175. *Art Hill, Inc.*, 898 N.E.2d at 365-66.

176. *Id.* at 365.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 365-66.

181. *Id.* at 366.

182. *Id.* at 367-68.

than the right to be present in any other context.”<sup>183</sup> After noting that Art Hill had received notice, by providing the ALJ with a number where he could be reached, but took no steps to make other arrangements when the extension could not be used, the court determined that it could not be said that Art Hill “was denied a reasonable opportunity for a fair hearing.”<sup>184</sup> As such, the court affirmed the decision to grant unemployment benefits.<sup>185</sup>

In another case, *Forni v. Review Board of the Indiana Department of Workforce Development*,<sup>186</sup> the court of appeals reached the opposite conclusion. In that case, Forni was discharged, and after she was granted unemployment benefits, her former employer appealed.<sup>187</sup> Although notice of a telephonic hearing was sent to Forni, she was traveling out of the state and did not receive the notice until she returned, after the hearing.<sup>188</sup> Forni notified the Review Board of this fact and provided her travel itinerary as evidence that she was out of the state, but the Review Board nevertheless affirmed the ALJ’s determination that her employer discharged her for cause.<sup>189</sup>

Relying on a prior decision, the Review Board argued that actual notice of the hearing was not required; however the court of appeals distinguished that case, noting that it decided the case on due process grounds.<sup>190</sup> Instead, the court of appeals turned to more recent precedent, which had found that the statutory grant of a “reasonable opportunity for a fair hearing” required actual notice.<sup>191</sup> The court of appeals thus reversed and ordered a new hearing.<sup>192</sup>

### III. OPEN DOOR LAW

Indiana’s Open Door Law provides that “official action[s]” are to be conducted at an open meeting<sup>193</sup> the purpose of which is to ensure the agency actions are conducted “openly so that the general public may be fully informed.”<sup>194</sup> Several cases during the survey period dealt with issues that can arise from the need to conduct such public meetings.

---

183. *Id.* at 368.

184. *Id.* (citation omitted).

185. *Id.*

186. 900 N.E.2d 71 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 988 (Ind. 2009).

187. *Id.* at 71-72.

188. *Id.* at 72.

189. *Id.*

190. *Id.* at 73 (citing *Osborn v. Review Bd. of the Ind. Employment Sec. Div.*, 398 N.E.2d 495 (Ind. App. 1978)).

191. *Id.* (quoting *Scott v. Review Bd. of Ind. Dep’t of Workforce Dev.*, 725 N.E.2d 993, 996 (Ind. Ct. App. 2000)).

192. *Id.*

193. IND. CODE § 5-14-1.5-1 (2005).

194. *City of Gary v. McCrady*, 851 N.E.2d 359, 365 (Ind. Ct. App. 2006) (citing *Gary/Chicago Airport Auth. v. Maclin*, 772 N.E.2d 463, 468 (Ind. Ct. App. 2002); IND. CODE § 5-14-1.5-1 (2005)).



In *Lake County Trust Co. v. Advisory Plan Commission*,<sup>195</sup> the Indiana Supreme Court confronted the issue of whether a governmental entity could be sanctioned under the Indiana Alternative Dispute Resolution (ADR) Rules.<sup>196</sup> In that case, the Advisory Plan Commission denied a developer plat approval for a subdivision in Lake County.<sup>197</sup> The developers sought judicial review, and the trial court offered mediation.<sup>198</sup> The result of the mediation was a written settlement agreement that contained a revised plat and, critically, contained language that the Plan Commission “shall at its next regular meeting . . . approve this agreement and its engineering.”<sup>199</sup> Unfortunately, at the next meeting, the Plan Commission did not vote to approve the agreement, but rather deferred the vote for thirty days.<sup>200</sup> At that point, the developers sought to enforce the agreement, and the Plan Commission voted to reject it.<sup>201</sup>

The trial court ordered the settlement be enforced and ordered the Plan Commission to approve the plat, which the Commission did.<sup>202</sup> The trial court, however, also found that the Plan Commission acted in bad faith by failing to approve the agreement initially after it had granted its attorneys full settlement authority during an open meeting.<sup>203</sup> The court determined that a governmental entity such as the Plan Commission was not subject to sanctions under the ADR rules, but nevertheless ordered the Plan Commission to reimburse the developer the cost of mediation.<sup>204</sup>

The Indiana Supreme Court first addressed the issue of whether governmental entities could be subject to sanction under the ADR rules.<sup>205</sup> The court noted that its prior decision holding that a court could not impose treble damages on a governmental entity also recognized a court’s inherent authority to impose sanctions on governmental entities because “[w]hen the State enters the court as a litigant, it places itself on the same basis as any other litigant; subjecting itself to the inherent authority of the court to control actions before it.”<sup>206</sup> Noting that the ADR rules make no exceptions for governmental entities, the court concluded that the ADR rules were “more analogous to the exercise of inherent judicial authority than to the imposition of punitive damage awards” from which governments are immune.<sup>207</sup> Thus, the court held that governmental

---

195. 904 N.E.2d 1274 (Ind. 2009).

196. *See id.* at 1275.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 1275-76.

202. *Id.* at 1276.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 1277 (quoting *Noble County v. Rogers*, 745 N.E.2d 194, 199 (Ind. 2001)).

207. *Id.* at 1278.

entities could be sanctioned under the ADR rules.<sup>208</sup>

But the court did not conclude that the Plan Commission had acted in bad faith during the mediation.<sup>209</sup> Reviewing the relevant statutes, the court determined that because a plan commission's act is not final until approved at a meeting of the commission, the "statutory scheme operates to preclude the delegation of plan commission authority for final approval of subdivision plats."<sup>210</sup> Thus, because the settlement was not final, and could not be final until approved at a meeting "subject to the Open Door Law," the court concluded that the failure to promptly approve the subdivision did not constitute bad faith.<sup>211</sup>

#### CONCLUSION

Although the basic foundations of administrative law are well settled, as this Article shows, the diverse nature of the matters handled by this state's administrative agencies frequently produce unique and challenging questions of law for Indiana's courts. Indeed, this Article reviewed only a small fraction of the number of reported administrative law cases from Indiana's appellate courts. Many cases go unreported and more never reach the courts. Thus, even for creatures of statute, the tradition of the common law continually operates to put flesh on the bones as new issues arise, new approaches are taken, and new challenges are confronted.

---

208. *See id.*

209. *Id.* at 1280.

210. *Id.* at 1279.

211. *Id.*



# DEVELOPMENTS IN INDIANA APPELLATE PROCEDURE: RULE AMENDMENTS, REMARKABLE CASE LAW, AND GUIDANCE FOR APPELLATE PRACTITIONERS

BRYAN H. BABB\*  
KELLIE M. BARR\*\*  
SUZANNA HARTZELL-BAIRD\*\*\*

## INTRODUCTION

The Indiana Rules of Appellate Procedure (“Appellate Rules”) were adopted in 2000. Each year, the Appellate Rules are defined, refined, and enhanced by the Indiana Supreme Court (“supreme court”), the Indiana Court of Appeals (“court of appeals”), and the Indiana Tax Court (“tax court”) through rule amendments and appellate decisions. This article tracks developments in appellate procedure between October 1, 2008, and September 30, 2009, by summarizing rule amendments, examining court opinions affecting appellate procedure, and synthesizing case law to provide tips to practitioners hoping to improve their appellate practice.

## I. RULE AMENDMENTS

Between October 1, 2008, and February 6, 2009, the Indiana Supreme Court made substantive amendments to Appellate Rules 4, 15, 16, 20, 26, 44, and 66.<sup>1</sup>

---

\* Partner, Bose McKinney & Evans LLP; Chair of the firm’s Appellate Services Group. B.S., 1989, United States Military Academy; M.S.B.A., 1994, Boston University; J.D., *cum laude*, 1999, Indiana University Maurer School of Law; Editor-in-Chief, Volume 74, *Indiana Law Journal*; Law Clerk to Justice Frank Sullivan, Jr., Indiana Supreme Court (1999-2000); Indiana State Bar Association (Appellate Practice Section Council member, 2005-2007); Indianapolis Bar Association (Immediate Past Chair, Appellate Practice Section; Immediate Past Chair, *Amicus Curiae* Committee; Executive Committee, 2010); The Best Lawyers in America®, 2008-2010 (Appellate); Indiana Super Lawyer®, 2009-2010 (Appellate).

\*\* Associate, Bose McKinney & Evans LLP. B.A., 2003, Indiana University—Bloomington; J.D., 2006, Indiana University Maurer School of Law; Chief Justice, Moot Court Board; Articles Editor, Volume 81, *Indiana Law Journal*; Judicial Law Clerk to Chief Judge John G. Baker, Indiana Court of Appeals (2006-2008); Indianapolis American Inn of Court; Co-author of Civil Case Law Updates for *Res Gestae* legal magazine.

\*\*\* Associate, Bose McKinney & Evans LLP. B.S., *highest distinction*, 2004, Indiana University-Purdue University—Indianapolis; J.D., *summa cum laude*, 2007, Indiana University School of Law—Indianapolis; Note Development Editor, Volume 40, *Indiana Law Review*; Law Clerk to Chief Justice Randall Shepard, Indiana Supreme Court (2007-2008); Author of *When Sex Doesn’t Sell: Mitigating the Damaging Effect of Megan’s Law on Property Values*, 35 REAL EST. L.J. 353 (2006); Phi Delta Phi Graduate of the Year Award, 2007; Jack Lyle Scholarship, 2006; U.S. Supreme Court Justice Anthony Kennedy Scholarship, 2004-2007.

1. See *Order Amending Indiana Rules of Appellate Procedure*, No. 94S00-0901-MS-4 (Ind. Sept. 15, 2009), available at <http://www.in.gov/judiciary/orders/rule-amendments/2009/0909-apppro.pdf> [hereinafter Sept. 15, 2009 Appellate Rules Order] (amending Appellate Rules 4, 5, 15,

These amendments all took effect on January 1, 2010. The court also amended Administrative Rules 5 and 9 and Attachment A to Administrative Rule 5, and the court added Administrative Rule 8.1.<sup>2</sup>

*A. Appellate Rule 4—Supreme Court Jurisdiction over Death Penalty or Life Without Parole Appeals*

Subsection (3) was added to Rule 4(A), which governs supreme court jurisdiction. It provides: “The Supreme Court shall have jurisdiction over interlocutory appeals authorized under Appellate Rule 14 in any case in which the State seeks the death penalty or in life without parole cases in which the interlocutory order raises a question of interpretation of [Indiana Code §] 35-50-2-9.”<sup>3</sup> The addition of subsection (3) is consistent with subsection (1) of the same Rule, which gives the supreme court “mandatory and exclusive jurisdiction over . . . [c]riminal appeals in which a sentence of death or life imprisonment without parole is imposed under [Indiana] Code § 35-50-2-9.”<sup>4</sup> The supreme court also amended Rule 5, which confers jurisdiction over interlocutory appeals to the Indiana Court of Appeals, by excepting interlocutory appeals described in Rule 4(A)(3) from the court of appeals’s jurisdiction.<sup>5</sup>

*B. Appellate Rules 15, 16, and 20—Amendments Regarding Appellate Alternative Dispute Resolution*

Over the past year, the supreme court has made a number of rule changes to encourage the use of appellate alternative dispute resolution (ADR). Under Appellate Rule 15(C)(4)(g), appellants were previously required to identify in the appellant’s case summary whether ADR had been used and whether “it should be used on appeal.”<sup>6</sup> Now, appellants are required to identify whether ADR has been used and “whether appellant *is willing* to participate in Appellate ADR.”<sup>7</sup>

---

16, 20, 44, and 66); *Order Amending Indiana Rules of Appellate Procedure*, No. 94S00-0901-MS-4 (Ind. Oct. 2, 2009), available at <http://www.in.gov/judiciary/orders/rule-amendments/2009/0909-apppro2.pdf> [hereinafter Oct. 2, 2009 Appellate Rules Order] (amending Appellate Rules 15 and 26).

2. See *Order Amending Indiana Administrative Rules*, No. 94S00-0901-MS-4 (Ind. Sept. 15, 2009), available at <http://www.in.gov/judiciary/orders/rule-amendments/2009/0909-admin.pdf> [hereinafter Sept. 15, 2009 Administrative Rules Order].

3. IND. APP. R. 4(A)(3). Indiana Code § 35-50-2-9 (2008) provides that the state may seek either a death sentence or a sentence of life imprisonment without parole for murder if one of the listed aggravating circumstances is present.

4. IND. APP. R. 4(A)(1).

5. IND. APP. R. 5(B).

6. Sept. 15, 2009 Appellate Rules Order, *supra* note 1, at 2.

7. IND. APP. R. 15(C)(4)(g) (emphasis added). Appellate Form 15-1, the Appellant’s Case Summary (Appearance) Form, now includes a space for appellants to indicate whether they are willing to participate in appellate ADR; if so, the form instructs appellants to include a brief statement of the facts of the case. FORM APP. R. 15-1.



This change in the rule language appears to be a clarification of the court's intent, which was presumably to facilitate the use of appellate ADR. Similarly, the court added subsection (4) to Appellate Rule 16(B), requiring the appellee to identify in his or her appearance whether he or she "is willing to participate in Appellate ADR."<sup>8</sup> The court also added a sentence to Appellate Rule 20, the appellate ADR rule, which states: "The parties in civil cases are encouraged to consider appellate mediation."<sup>9</sup>

*C. Appellate Rule 26—E-mail Transmission of Appellate Orders*

Appellate Rule 26 previously permitted fax transmission of appellate orders.<sup>10</sup> The rule now provides for mandatory e-mail transmission of orders, opinions, and notices to all represented parties.<sup>11</sup> Unrepresented parties will receive orders, opinions, and notices by U.S. postal mail or personal delivery unless the party requests e-mail or fax transmission in a written, signed request.<sup>12</sup> But unrepresented parties may not request both e-mail and fax transmission.<sup>13</sup> The different treatment of represented and unrepresented parties in Rule 26 implies that a party represented by an attorney cannot request fax or U.S. postal mail transmission.<sup>14</sup> Furthermore, when one transmittal is made to either represented or unrepresented parties by e-mail or fax, no other transmission will occur.<sup>15</sup>

*D. Appellate Rule 44—Page Limitations on Brief of Intervenor or Amicus Curiae on Transfer or Rehearing*

Appellate Rule 44(D) provides page limitations for briefs and petitions where the party filing the brief does not provide a word count certificate in accordance with subsections (E) and (F) of Rule 44.<sup>16</sup> The supreme court added a provision to subsection (D) requiring that briefs submitted by intervenors or amicus curiae on *transfer* or *rehearing* be limited to ten pages.<sup>17</sup> Appellate Rule 44(D) also provides that other briefs filed by intervenors or amici curiae are limited to

---

8. IND. APP. R. 16(B)(4).

9. IND. APP. R. 20.

10. See Oct. 2, 2009 Appellate Rules Order, *supra* note 1, at 1.

11. IND. APP. R. 26(A).

12. IND. APP. R. 26(B). Appellate Rule 15-1, the Appellant's Case Summary (Appearance) Form, allows unrepresented parties to select the method by which they prefer to receive court orders, opinions, and notices. Represented parties do not have this choice. FORM APP. R. 15-1.

13. IND. APP. R. 26(B).

14. The court also amended Rule 15(C)(1) to delete subsection (c), which previously allowed attorneys to request transmission of appellate opinions by fax. IND. APP. R. 15(C)(1); Oct. 2, 2009 Appellate Rules Order, *supra* note 1, at 1.

15. IND. APP. R. 26(C).

16. IND. APP. R. 44(D).

17. *Id.* (emphasis added); Sept. 15, 2009 Appellate Rules Order, *supra* note 1, at 4.

fifteen pages.<sup>18</sup>

The court also added a provision to Rule 44(E) stating that when an intervenor or amicus curiae files a brief on transfer or rehearing that includes a word count certificate in compliance with subsections (E) and (F), the brief is limited to 4200 words.<sup>19</sup> Finally, Rule 44(E) provides that other briefs filed by intervenors or amici curiae with word count certificates are limited to 7000 words.<sup>20</sup>

*E. Appellate Rule 66—Damages for Frivolous or Bad Faith Filings*

Appellate Rule 66(E) provides in part that “[t]he court may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith.”<sup>21</sup> Before its amendment, the Rule was titled “Damages Against Appellant for Frivolous or Bad Faith Filings.”<sup>22</sup> After the amendment, the Rule is now titled “Damages for Frivolous or Bad Faith Filings.”<sup>23</sup> This deletion appears to reflect the court’s intent that damages for bad faith filings can be assessed against either appellants or appellees.

*F. Attachment A to Administrative Rule 5—Payment Schedule for Senior Judges*

The supreme court amended Attachment A to Administrative Rule 5 by adding subsections (E) and (F) to Part I.<sup>24</sup> Together these subsections provide that a senior judge cannot claim service time or per diem for traveling to and from a court where the judge serves or “for scheduled senior judge service which is canceled through no fault of the senior judge.”<sup>25</sup> Senior judges may claim credit only for actual time served in a court.<sup>26</sup> Part II of Attachment A was amended to provide that senior judges who serve as domestic relations mediators cannot receive a senior judge per diem as provided in Indiana Code § 33-23-3-5, but they can “receive compensation from the alternative dispute resolution fund under [Indiana Code provision] 33-23-6 in accordance with the county domestic relations alternative dispute resolution plan.”<sup>27</sup>

*G. Administrative Rule 8.1—Uniform Appellate Case Numbering System*

By adding Administrative Rule 8.1, which became effective on January 1, 2010, the supreme court created a uniform appellate case numbering system for

---

18. IND. APP. R. 44(D).

19. IND. APP. R. 44(E).

20. *Id.*

21. IND. APP. R. 66(E).

22. See Sept. 15, 2009 Appellate Rules Order, *supra* note 1, at 5 (emphasis added).

23. IND. APP. R. 66(E).

24. See Sept. 15, 2009 Administrative Rules Order, *supra* note 2, at 3.

25. IND. ADMIN. R. 5, Attachment A, Part I(E)-(F).

26. *Id.*

27. *Id.* at Part II.



cases filed in the supreme court, court of appeals, and tax court.<sup>28</sup> The following is an example of the case numbering to be employed: 55S00-0804-SJ-001.<sup>29</sup> The first group of five characters represents the county and the court identifier.<sup>30</sup> The first and second characters in the group “represent the county of the court from which the case is being appealed or [from which] the original action arose.”<sup>31</sup> The third character in the first group “represent[s] the court in which the proceeding is being filed.”<sup>32</sup> The last two characters of the first group “distinguish between geographical districts set forth in [Indiana Code § 33-25-1-2] from which the case is being appealed or being assigned in the Court of Appeals, and additional cases and other matters handled by the Supreme Court and the Tax Court.”<sup>33</sup> The second group of four characters represents “the year and month of filing.”<sup>34</sup> The third group of two characters “designate[s] the type of proceeding.”<sup>35</sup> The fourth group consists of “any number of characters assigned sequentially to a case when it is filed.”<sup>36</sup> It begins with “1” at the “beginning of each year for each case classification and continue[s] sequentially until the end of the year.”<sup>37</sup>

*H. Administrative Rule 9(G)(1.1)-(1.3)—Information  
Excluded from Public Access*

Subsections 1.1, 1.2, and 1.3 were added to Administrative Rule 9(G), which governs court records excluded from public access.<sup>38</sup> These subsections provide:

(1.1) *Court Proceedings Closed to the Public.* During court proceedings that are closed to the public by statute or court order, when information in case records that is excluded from public access pursuant to this rule is admitted into evidence, the information shall remain excluded from public access.

(1.2) *Court Proceedings Open to the Public.* During court proceedings that are open to the public, when information in case records that is excluded from public access pursuant to this rule is admitted into evidence, the information shall remain excluded from public access only if a party or a person affected by the release of the information, prior to

---

28. IND. ADMIN. R. 8.1(A).

29. Administrative Rules 8 and 8.1 provide the universe of possible character combinations for each grouping.

30. IND. ADMIN. R. 8.1(B)(1).

31. *Id.*

32. *Id.*

33. *Id.*

34. IND. ADMIN. R. 8.1(B)(2).

35. IND. ADMIN. R. 8.1(B)(3).

36. IND. ADMIN. R. 8.1(B)(4).

37. *Id.*

38. See Sept. 15, 2009 Administrative Rules Order, *supra* note 2, at 12.

or contemporaneously with its introduction into evidence, affirmatively requests that the information remain excluded from public access.

(1.3) *Access to Excluded Information.* Access to information excluded from public access under subsections 1.1 and 1.2 may be granted after a hearing pursuant to Administrative Rule 9(I).<sup>39</sup>

Additionally, the court amended Rule 9(G)(4)—which imposes certain obligations on the parties, counsel, courts of appeal, and the clerks of the supreme court, court of appeals, and tax court relating to records excluded from public access—to limit the scope of the rule to “appellate proceedings pending as of or commencing after January 1, 2009.”<sup>40</sup>

## II. CASE LAW INTERPRETING THE APPELLATE RULES

The majority of case law interpreting the Appellate Rules is handed down by the court of appeals. Although the supreme court and tax court occasionally have opportunities to construe and apply the Rules, the volume of cases the court of appeals decides each year presents it with more opportunities to construe the Appellate Rules and refine appellate procedure.

### A. Appellate Jurisdiction

Determining when an appellate court has jurisdiction over an issue is not always as straightforward as it may seem. The appellate courts provided guidance on determining appellate jurisdiction in the cases profiled below.

1. *Issue Not Ripe for Appellate Review.*—In *T-3 Martinsville, LLC v. U.S. Holding, LLC*,<sup>41</sup> the appellants brought an interlocutory appeal regarding rulings the trial court made against them on summary judgment, and the appellees cross-appealed rulings stemming from the same summary judgment order.<sup>42</sup> The court of appeals affirmed the portion of the trial court’s order denying the appellants’ summary judgment motion and granting summary judgment against them on a related issue.<sup>43</sup> One of the issues the appellees presented on cross-appeal was whether the trial court erred by compounding late charges owed to the appellants for the six-month period between the trial court’s interlocutory order for the payment of money and the summary judgment order.<sup>44</sup> The appellants argued that because the trial court’s prior ruling was “an interlocutory order for the payment of money,” the appellees “had to bring such appeal within thirty days of the ruling” and “[h]aving failed to do so . . . [a]ppellees must wait until after the final judgment on damages [was] entered to present the matter of compound

---

39. *Id.*

40. *Id.*

41. 911 N.E.2d 100 (Ind. Ct. App.), *aff’d on reh’g*, 916 N.E.2d 205 (Ind. Ct. App. 2009), *trans. denied*, 2010 LEXIS 174 (Ind. Feb. 25, 2010).

42. *Id.* at 103.

43. *Id.* at 109-17.

44. *Id.* at 117.



charges for appellate review.”<sup>45</sup>

The court of appeals noted that although an interlocutory order may be appealable as a matter of right, “there is no requirement that an interlocutory appeal be taken. A claimed error in an interlocutory order is not waived for failure to take an interlocutory appeal but may be raised on appeal *from the final judgment*.”<sup>46</sup> Ultimately, the court agreed with the appellants and held, “Having failed to appeal the [trial court’s prior ruling] within thirty days, [a]ppellees must now wait until the final judgment, i.e., the one that ‘leaves nothing for future determination,’ is entered.”<sup>47</sup> The court further held, “Simply put, we agree with [the appellants] that there has been no final determination of late charges for this Court to consider on appeal. . . . As such, the question of compound charges is not yet ripe for appellate review.”<sup>48</sup>

The court of appeals observed in a footnote that “there may be instances in which a cross-appeal from a prior interlocutory order may be appropriate.”<sup>49</sup> The court relied on *Murray v. City of Lawrenceburg*<sup>50</sup> for this proposition, although the supreme court had already granted transfer in the case. *Murray* held that a cross-appellant had demonstrated good cause for the court to consider an issue regarding a prior interlocutory order because the court had already agreed to exercise interlocutory jurisdiction over a related issue; the issue raised by the cross-appellant was “potentially dispositive,” and “judicial economy [was] . . . served by consideration of both certified interlocutory orders simultaneously.”<sup>51</sup> Considering that the *T-3 Martinsville* court held that it could *not* address the cross-appellant’s interlocutory appeal and acknowledged that the supreme court had already granted transfer in *Murray*, it is interesting that the *T-3 Martinsville* court still detailed *Murray*’s holding. Perhaps the *T-3 Martinsville* panel was signaling to the supreme court that it agreed with the *Murray* panel’s decision to address the cross-appellant’s interlocutory appeal.<sup>52</sup>

2. *Pre-Appeal Conference Filing Helpful*.—In *Lake County Trust Co. v. Advisory Plan Commission*,<sup>53</sup> the supreme court addressed an appellant’s

---

45. *Id.* at 117-18 (citing IND. APP. R. 14(A), which provides that interlocutory orders for the payment of money are appealable “as a matter of right by filing a [n]otice of [a]ppeal with the trial court clerk within thirty . . . days of the entry of the interlocutory order”).

46. *Id.* at 118 (quoting *Bojrab v. Bojrab*, 810 N.E.2d 1008, 1014 (Ind. 2004)).

47. *Id.* (quoting *Georgos v. Jackson*, 790 N.E.2d 448, 451 (Ind. 2003)).

48. *Id.* at 118-19.

49. *Id.* at 118 n.14 (citing *Murray v. City of Lawrenceburg*, 903 N.E.2d 93, 100 (Ind. Ct. App. 2009), *trans. granted* 919 N.E.2d 545 (Ind. 2009), *vacated*, 2010 WL 1558608 (Ind. Apr. 20, 2010)).

50. 903 N.E.2d 93 (Ind. Ct. App.), *trans. granted*, 919 N.E.2d 545 (Ind. 2009), *opinion vacated*, 925 N.E.2d 728 (Ind. 2010).

51. *Id.* at 100.

52. Judge Mathias was the writing judge in *Murray*, with Judge Brown concurring and Chief Judge Baker concurring on that issue, while Judge Crone was the writing judge in *T-3 Martinsville*, with Judges Bradford and Brown concurring.

53. 904 N.E.2d 1274 (Ind. 2009).

procedural challenge to the cross-appellant's argument regarding a prior interlocutory order.<sup>54</sup> The appellant argued that the cross-appellant could not challenge the prior interlocutory order because it had not taken an interlocutory appeal from that order, and by complying with the order, the cross-appellant had "waived its right to challenge any alleged error in the trial court's [prior interlocutory order]."<sup>55</sup> The supreme court cited *Bojrab v. Bojrab*<sup>56</sup> and *Georgos v. Jackson*<sup>57</sup> for the proposition that the cross-appellant was not required to institute an interlocutory appeal from the prior order and "instead was entitled to challenge it as part of its appeal from the court's final judgment."<sup>58</sup> Although the supreme court recognized that the cross-appellant's notice of appeal<sup>59</sup> indicated that it was challenging a subsequent order as an interlocutory order, the cross-appellant "clarified that [it was] appealing [that order] as a final appealable order" in its reply supporting its motion for an Appellate Rule 19 pre-appeal conference.<sup>60</sup> The supreme court ultimately concluded that the cross-appellant had not waived its right to challenge the order.<sup>61</sup>

3. *Court Sua Sponte Considers Appellate Jurisdiction.*—In *In re T.B.*,<sup>62</sup> the court of appeals analyzed its jurisdiction over the appeal because the appellant had "filed several notices of appeal from the juvenile court's various orders."<sup>63</sup> The court noted, "The lack of appellate jurisdiction may be raised at any time, and if, as here, the parties do not question subject matter jurisdiction, the appellate court may consider the issue sua sponte."<sup>64</sup> Although the appellant characterized one of the juvenile court's orders as a final appealable order, the court of appeals held, "This characterization was incorrect, in that the order did not dispose of all claims as to all parties."<sup>65</sup> The court observed that although the appellant had not requested the trial court to certify the interlocutory order for appeal, it still would have jurisdiction over the appeal if the order resulted in an interlocutory appeal as a matter of right.<sup>66</sup> Before concluding that the order did

---

54. *Id.* at 1278.

55. *Id.* at 1278 n.2.

56. 810 N.E.2d 1008, 1014 (Ind. 2004).

57. 790 N.E.2d 448, 452 (Ind. 2003).

58. *Lake County Trust Co.*, 904 N.E.2d at 1278 n.2.

59. Although the cross-appellant in *Lake County Trust Co.* filed a notice of appeal, it was not required to do so. IND. APP. R. 9(D) (providing that, "[a]n appellee may cross-appeal without filing a Notice of Appeal by raising cross-appeal issues in the appellee's brief"). Rule 9(D) cautions, however, "A party must file a Notice of Appeal to preserve its right to appeal if no other party appeals." *Id.*

60. *Lake County Trust Co.*, 904 N.E.2d at 1278 n.2. This appears to be the first time the supreme court has referenced an Appellate Rule 19 pre-appeal conference in an opinion.

61. *Id.*

62. 895 N.E.2d 321 (Ind. Ct. App. 2008).

63. *Id.* at 330.

64. *Id.* at 329 (citing *Georgos v. Jackson*, 790 N.E.2d 448, 451 (Ind. 2003)).

65. *Id.* at 330 (internal quotation omitted).

66. *Id.* at 330-31.



not meet the criteria outlined in Appellate Rule 14(A),<sup>67</sup> the court held, “To the extent one might argue that the juvenile court’s orders ‘compel the delivery of . . . documents’ pursuant to Appellate Rule 14(A)(3), we believe that the rule applies only to documents held by persons or entities other than trial courts.”<sup>68</sup> Because it is unnecessary for a trial court to compel surrender of its own documents, the court of appeals held that Appellate Rule 14(A)(3) did not apply to the order.<sup>69</sup> The court of appeals ultimately concluded that another appealed order was a final appealable order, which allowed the court to review the prior interlocutory order.<sup>70</sup>

4. *Multiple Notices of Appeal Untangled.*—*In re Guardianship of L.R.*<sup>71</sup> presented the court of appeals with a “tangled knot of multiple trial court orders and multiple notices of appeal.”<sup>72</sup> The appellant filed her first notice of appeal more than three months after the interlocutory order at issue.<sup>73</sup> Although she had filed a motion to correct error targeting that order, the court deemed it improper to file a motion to correct error following an interlocutory order. Therefore, the motion did not extend the thirty-day deadline to file a notice of appeal.<sup>74</sup> The interlocutory order was for the payment of money and would have supported an interlocutory appeal as a matter of right pursuant to Appellate Rule 14(A)(1) if the appeal had been timely, but because the appellant’s notice of appeal was untimely, the court concluded that its motions panel properly dismissed that notice of appeal.<sup>75</sup>

The court of appeals also concluded that it did not have jurisdiction over the appellant’s second notice of appeal because the underlying order was not appealable as a matter of right and the appellant did not seek to have the order certified for interlocutory appeal.<sup>76</sup> Although the second order permitted the guardian to hire paid co-counsel, the order “was not for the payment of money; in fact, the order explicitly directed the [g]uardian to submit any fee requests for trial court approval before disbursement.”<sup>77</sup>

Turning to the appellant’s third notice of appeal, the court concluded that it “was timely filed and concerned an interlocutory order for the payment of

---

67. The court did not specify which language from the interlocutory order it was referencing, but portions of the order are cited later in the opinion. See *id.* at 339-40.

68. *Id.* at 330 n.11 (citing *Allstate Ins. Co. v. Scrogan*, 801 N.E.2d 191, 194 (Ind. Ct. App. 2004) (“Rule 14(A)(3) pertains to the delivery of documents where delivery imports a surrender. Surrender may occur with such items as securities, receipts, deeds, leases, or promissory notes.”)).

69. *Id.*

70. *Id.* at 331 (citing *Bojrab v. Bojrab*, 810 N.E.2d 1008, 1014 (Ind. 2004)).

71. 908 N.E.2d 360, 362 (Ind. Ct. App. 2009).

72. *Id.*

73. *Id.* at 364.

74. *Id.* (citing *Young v. Estate of Sweeney*, 808 N.E.2d 1217, 1221 n.6 (Ind. Ct. App. 2004)).

75. *Id.* at 364-65.

76. *Id.*

77. *Id.* at 365.

money; consequently, it clear[ed] these rudimentary hurdles.”<sup>78</sup> The appellee challenged the appellant’s standing to raise arguments regarding prior appellate attorney fees and administrative fees, but the court concluded that the appellant had standing.<sup>79</sup> The court reiterated that “attorney fees may not be awarded for time spent preparing and defending fee petitions,” but because the fees at issue stemmed from time spent preparing an appellees’ brief, that general rule did not apply.<sup>80</sup> The appellant argued that the trial court had abused its discretion by awarding administrative fees when the guardian had not included a line item breakdown detailing how it calculated those fees.<sup>81</sup> Although the court of appeals emphasized that it “would prefer that the [g]uardian include line item descriptions of how it amasses its fees in the future,” because there was evidence in the record supporting how the guardian had spent its time, the court could not “conclude that its requested fees were unreasonable or that the trial court abused its discretion.”<sup>82</sup>

5. *Tax Court Explains Timeliness of Notice of Appeal After Bench Ruling.*—The tax court addressed the interaction between a motion for extension of time pursuant to Indiana Trial Rule 72(E) and the requirements for filing a notice of appeal in *Indiana Department of State Revenue v. Estate of Miller*.<sup>83</sup> The probate court held a hearing regarding the proper amount of inheritance tax owed by the estate on April 25, 2006.<sup>84</sup> The court noted, “At the conclusion of the hearing, the probate court stated that the [t]rust assets had been properly distributed and . . . requested that the [e]state prepare an entry reflecting its statement and submit that entry to the Department [of State Revenue] for its review.”<sup>85</sup> The clerk of court made a record of the hearing on the case’s chronological summary (CCS), and the parties submitted a proposed entry on May 1, 2006. Although the probate court signed the entry on May 3, 2006, the chronological case summary did not indicate whether a copy had been mailed to the parties. Counsel for the Department of State Revenue (“Department”) telephoned the probate court on June 20, 2006 regarding the status of the entry and was informed that the probate court had signed it on May 3, 2006. The next day, the Department “requested an extension of time from the probate court to file its notice of appeal because it never received a signed and dated copy of the probate court’s May 3, 2006 entry.”<sup>86</sup> The probate court granted the Department’s request over the estate’s objection. Both parties appealed to the tax court, which heard oral argument on

---

78. *Id.*

79. *Id.*

80. *Id.* at 366 (citing *In re Estate of Inlow*, 735 N.E.2d 240, 254-55 (Ind. Ct. App. 2000)).

81. *Id.*

82. *Id.*

83. 894 N.E.2d 286 (Ind. Tax Ct.), *aff’d on reh’g*, 897 N.E.2d 545, 546 (Ind. Tax Ct. 2008), *trans. denied*, 915 N.E.2d 989 (Ind. 2009).

84. *Id.* at 288.

85. *Id.*

86. *Id.*



the issue.<sup>87</sup>

The tax court noted that a party seeking to appeal a probate court's final judgment of the amount of inheritance tax owed "must file 'a [n]otice of [a]ppeal with the [probate] court clerk within thirty (30) days after the entry of [the f]inal [j]udgment.'"<sup>88</sup> The court acknowledged that "[a] party's failure to timely file its notice of appeal . . . will not necessarily result in the forfeiture [of] its right to appeal"<sup>89</sup> because the probate court may "grant a party additional time to perfect its appeal pursuant to Trial Rule 72(E),"<sup>90</sup> which provides in relevant part:

When the mailing of a copy of the entry by the Clerk is not evidenced by a note made by the Clerk upon the Chronological Case Summary, the Court, upon application for good cause shown, may grant an extension of any time limitation within which to contest such ruling, order or judgment to any party who was without actual knowledge . . . .<sup>91</sup>

But "[a] party with actual knowledge of a ruling may not rely upon [Trial Rule 72(E)] for an extension of time."<sup>92</sup> The appellee estate argued that the probate court had abused its discretion by granting the Department's motion for extension of time to file its notice of appeal because the Department "obtained actual knowledge of the judgment during the April 25, 2006 hearing when the probate court orally rendered the judgment."<sup>93</sup> The Department argued that it "did not obtain actual knowledge of the judgment until June 20, 2006, as the probate court only 'announced its *intention* to deny the Department's Petition' during the [April 25] hearing."<sup>94</sup>

The tax court first analyzed the probate court's ruling at the April 2006 hearing to determine if that ruling was a final judgment pursuant to Appellate Rule 2(H).<sup>95</sup> An exchange between the probate court and the Department regarding the Department's right to appeal prompted the tax court to hold, "This exchange indicates that the probate court rendered a *final* judgment during the April 25, 2006 hearing . . . ."<sup>96</sup> Because the probate court rendered a final appealable judgment in the Department's presence at the hearing, the tax court held that the Department had actual knowledge of the judgment.<sup>97</sup> Consequently, the tax court concluded that the probate court had abused its discretion by

---

87. *Id.*

88. *Id.* (citing IND. CODE § 6-4.1-7-7; IND. APP. R. 9(A)(1)).

89. *Id.* at 288-89 (citing IND. TRIAL R. 72(E)).

90. *Id.*

91. IND. TRIAL R. 72(E).

92. *Estate of Miller*, 894 N.E.2d at 289 (quoting *Vaughn v. Schnitz*, 673 N.E.2d 501, 503 (Ind. Ct. App. 1996) (Hoffman, J., concurring)).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 290.

97. *Id.* at 290-91.

granting the Department an extension to file its notice of appeal “because the Department had actual knowledge of the final judgment prior to requesting an extension of time to perfect its appeal.”<sup>98</sup> Ultimately, the tax court reversed the probate court’s order granting the Department an extension of time to file its notice of appeal.<sup>99</sup>

The tax court subsequently issued another published opinion “for the sole purpose of clarifying its [original] opinion” after the Department moved for rehearing.<sup>100</sup> On rehearing, the Department again asserted that it lacked actual knowledge of the probate court’s judgment because its oral ruling “was not a judgment, given that it was not reduced to writing or dated and signed by the judge” on the date of the hearing.<sup>101</sup> The Department also argued that the tax court’s opinion “conflict[ed] with *Collins v. Covenant Mutual Insurance Company*”<sup>102</sup> and “improperly alter[ed] the manner by which the appellate time clock commences.”<sup>103</sup>

The tax court characterized the Department’s argument as “suggest[ing] that this Court either [was] unaware of, or ignored the import of, Indiana Appellate Rule 9(A)(1)[,] which controls when the period for filing an appeal commences.”<sup>104</sup> Appellate Rule 9(A)(1) provides in relevant part, “A party initiates an appeal by filing a Notice of Appeal with the trial court clerk within thirty (30) days after the entry of a Final Judgment.”<sup>105</sup> The tax court observed that the court of appeals has explained that the word “entry” in the rule “refers to the date that an order, ruling, or judgment is entered into the court’s Records of Judgments and Orders (RJO).”<sup>106</sup> Because the time to initiate an appeal commences when the ruling, order, or judgment is entered—and the tax court determined that the probate court’s judgment had been entered into the RJO on May 3, 2006—“the Department’s period for filing its notice of appeal commenced on May 3, 2006.”<sup>107</sup> The tax court noted, however, that the issue of when the Department’s period for filing its notice of appeal began

was not the issue that the Estate presented to this [c]ourt on cross-appeal. Rather, the issue the Estate presented to this [c]ourt on cross-appeal was

---

98. *Id.* at 291 (citing language in IND. TRIAL R. 72(E) that limits the grant of an extension of time to a “party who was without actual knowledge”); *see also* *Smith v. Deem*, 834 N.E.2d 1100, 1110 (Ind. Ct. App. 2005) (concluding that a party is not entitled to an extension when it has notice of the trial court’s ruling before entry into the record).

99. *Estate of Miller*, 894 N.E.2d at 291.

100. *Estate of Miller*, 897 N.E.2d 545, 546 (Ind. Tax Ct. 2008), *trans. denied*, 915 N.E.2d 989 (Ind. 2009).

101. *Id.* at 545-46.

102. *Id.* at 546 (citing *Collins v. Covenant Mut. Ins. Co.*, 644 N.E.2d 116 (Ind. 1994)).

103. *Id.*

104. *Id.*

105. IND. APP. R. 9(A)(1).

106. *Estate of Miller*, 897 N.E.2d at 546 (citing *Smith v. Deem*, 834 N.E.2d 1100, 1109-10 (Ind. Ct. App. 2005)).

107. *Id.*



whether the probate court properly granted the Department additional time to file its notice of appeal despite the fact that it had obtained actual knowledge of the judgment before it was entered into the RJO.<sup>108</sup>

Because the tax court considered these issues to be distinct, “resolution of the latter did not automatically affect the former” and the court’s opinion “did not alter either the manner or the time frame by which appeals are commenced.”<sup>109</sup>

Turning to the Department’s argument that the tax court’s opinion conflicted with the supreme court’s opinion in *Collins*, the court declared that

*Collins* does not stand for the proposition that relief under Indiana Trial Rule 72(E) only requires a showing that the CCS bore no indication that notice of the judgment had been sent to the complaining party. Rather, *Collins* established that Indiana Trial Rule 72(E) was the “sole vehicle” for pursuing an extension of time to file a notice of appeal.<sup>110</sup>

The court noted that *Collins* “implied that a party should not even *request* an extension of time to file a notice of appeal if the CCS indicates that a copy of the [c]ourt’s entry was sent to the parties.”<sup>111</sup> The tax court concluded that the Department’s interpretation of Indiana Trial Rule 72(E) “invite[d] the [c]ourt to ignore the portions of the Rule referring to good cause, lack of actual knowledge of the judgment, and reliance upon incorrect representations by Court personnel.”<sup>112</sup> Trial Rule 72(E) is intended to prevent “the ‘forfeiture of appellate rights due to expiration of time caused by [an] attorney’s *ignorance of the existence* of a ruling or order.’”<sup>113</sup> Because the Department was present at the hearing when the probate court rendered its judgment, “it would have been illogical for the Court to conclude that the Department was unaware of the existence of the judgment.”<sup>114</sup> Therefore, the tax court affirmed its original decision in its entirety.<sup>115</sup>

### *B. Indiana Does Not Recognize Horizontal Stare Decisis*

In a published order, Chief Judge John G. Baker of the Indiana Court of Appeals noted that Indiana does not recognize horizontal stare decisis and that “each panel of this Court has coequal authority on an issue.”<sup>116</sup> The appellant in the case at issue filed a motion to dismiss the appeal, asserting that the issue he raised was “moot because a panel of this Court issued an opinion on the issue [in

---

108. *Id.*

109. *Id.*

110. *Id.* at 547 (citing *Collins v. Covenant Mut. Ins. Co.*, 644 N.E.2d 116, 117 (Ind. 1994)).

111. *Id.* (citing *Collins*, 644 N.E.2d at 117-18).

112. *Id.*

113. *Id.* (quoting *Markle v. Ind. State Teachers Ass’n*, 514 N.E.2d 612, 613 (Ind. 1987)).

114. *Id.*

115. *Id.*

116. *In re J.J.*, 911 N.E.2d 659, 659 (Ind. Ct. App. 2009).

another case].”<sup>117</sup> Chief Judge Baker cited *Lincoln Utilities, Inc. v. Office of Utility Consumer Counselor*<sup>118</sup> for the proposition that “a court on appeal will follow its previous decisions unless provided with strong justification for departure.”<sup>119</sup> Because “Indiana does not, however, recognize horizontal *stare decisis*[.]” each panel is not bound by previous decisions of other panels.<sup>120</sup> Additionally, Appellate Rule 57 specifically contemplates diverse holdings by various panels on the court of appeals as grounds supporting transfer to the supreme court.<sup>121</sup> Because the appellant “failed to set forth whether the facts and circumstances of the underlying proceedings in the appeal it [sought] to dismiss [were] similar to those in the previous opinion such that a similar result would generally follow[.]” Chief Judge Baker denied the appellant’s motion to dismiss.<sup>122</sup>

### C. Calculating Due Date of Brief of Appellant

In *Cox v. Matthews*,<sup>123</sup> the court of appeals provided a detailed analysis of Appellate Rule 45 and the calculation of the due date of a brief of appellant.<sup>124</sup> The appellee moved to dismiss the brief of appellant, contending that the appellant had filed it four days late.<sup>125</sup> The appellant countered that the brief was “only one business day late,”<sup>126</sup> and the court should affirm the decision of the motions panel to allow it to file the brief late.<sup>127</sup>

Indiana Appellate Rule 45(B)(1) provides, in relevant part, “The appellant’s brief shall be filed no later than thirty (30) days after . . . the date the trial court clerk or Administrative Agency issues its notice of completion of the Transcript.”<sup>128</sup> Appellate Rule 45(D) provides, “The appellant’s failure to file timely the appellant’s brief may subject the appeal to summary dismissal.”<sup>129</sup> But because the court of appeals prefers to decide appeals on their merits rather than summarily, “when violations are comparatively minor, are not a flagrant violation of the appellate rules, and there has not been a failure to make a good faith effort

117. *Id.* (internal quote omitted).

118. 661 N.E.2d 562 (Ind. Ct. App. 1996).

119. *In re J.J.*, 911 N.E.2d at 659 (citing *Lincoln Utilities*, 661 N.E.2d at 565).

120. *Id.* (citing *O’Casek v. Children’s Home & Aid Soc’y of Ill.*, 892 N.E.2d 994, 1014 n.4 (Ill. 2008) (noting that “horizontal *stare decisis* is not an inexorable command, whereas vertical *stare decisis* is an obligation to follow the decisions of superior tribunals”)).

121. *Id.* at 659-60.

122. *Id.* at 660.

123. 901 N.E.2d 14 (Ind. Ct. App.), *trans. dismissed*, 915 N.E.2d 995 (Ind. 2009).

124. *Id.* at 18-21.

125. *Id.* at 18.

126. *Id.*

127. *Id.* n.2 (citing *Cincinnati Ins. Co. v. Young*, 852 N.E.2d 8, 12 (Ind. Ct. App. 2006) (“It is well settled that this court has the inherent authority to reconsider any order of the motions panel while the appeal remains *in fieri*.”)).

128. IND. APP. R. 45(B)(1)(b).

129. IND. APP. R. 45(D).



to substantially comply with those rules, the appeal will be allowed.”<sup>130</sup>

In *Cox*, the record indicated that the notice of completion of transcript was filed with the court of appeals on June 10, 2008. Thus, that date was “the date on which the trial court clerk ‘issued its notice of completion of the Transcript’ for purposes of Appellate Rules 10(D) and 45(B)(1).”<sup>131</sup> The appellant, however, emphasized “that the trial court clerk’s online docket prove[d] that the clerk did not issue the notice of completion of the transcript until June 11, 2008” because of a motion on that docket reading, “06-11-2008 Issue: 6/11/2008 Service: Notice of Completion of Clerk’s Portion/Transcript . . . .”<sup>132</sup> Additionally, “the postmark on the clerk’s envelope containing the notice of completion of the transcript” indicated that it was mailed to the appellant on June 11, 2008.<sup>133</sup>

The court of appeals noted that although the postmark on the envelope indicated when the parties were served with a copy of the notice of completion of transcript, “the language used in Appellate Rule 45(B)(1) is ‘issues,’ not ‘mails’ or ‘serves.’”<sup>134</sup> Appellate Rule 10(D) also orders the trial court clerk to “issue and file a Notice of Completion of Transcript” and “serve a copy on the parties within five (5) days after the court reporter files the Transcript.”<sup>135</sup> Consequently, the court of appeals held that trial court issued the notice of completion of transcript in *Cox* on the date it filed it with the court of appeals: June 10, 2008.<sup>136</sup>

The appellant also argued that its brief was only one business day late and the court of appeals had previously allowed appeals to proceed when a brief was filed one day late.<sup>137</sup> After concluding that the brief was actually two business days late, the court of appeals observed that for purposes of the Appellate Rules, “due dates are primarily calculated by calendar days . . . not business days.”<sup>138</sup> Therefore, non-business days are still included in any computation of time unless the non-business day is the last day of the time period or the amount of allowable time is less than seven days.<sup>139</sup> The court also noted that an appellant does not get the benefit of three additional days based on service by mail pursuant to Appellate Rule 25(C) to file its brief because “the trial court clerk is not ‘a party’ and therefore Rule 25(C) does not apply to these circumstances.”<sup>140</sup> Based on these calculations, the court of appeals determined that the appellant’s brief in

---

130. *Cox*, 901 N.E.2d at 19 (citing *Haimbaugh Landscaping, Inc. v. Jegen*, 653 N.E.2d 95, 99 (Ind. Ct. App. 1995)).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 19-20 (citing IND. APP. R. 45(B)(1)).

135. *Id.* at 20 (quoting IND. APP. R. 10(D)).

136. *Id.*

137. *Id.* at 20-21 (citing *Howell v. State*, 684 N.E.2d 576, 577 (Ind. Ct. App. 1997); *Haimbaugh Landscaping, Inc. v. Jegen*, 653 N.E.2d 95, 99 (Ind. Ct. App. 1995)).

138. *Id.* at 20.

139. *Id.*

140. *Id.* (citing IND. APP. R. 25(C)).

Cox was four days late.<sup>141</sup>

Despite the appellant's belated brief, the court of appeals concluded that "the record reflects that [appellant] made a good faith effort to substantially comply with the rules and that any violation was not flagrant."<sup>142</sup> Because the appellee failed to show as a matter of law that the motions panel erred by granting the appellant's motion to file a belated brief, the court declined to dismiss the appeal and addressed the merits of the case.<sup>143</sup>

*D. Court Considers New Facts on Rehearing in  
"Extraordinarily Rare Event"*

In *Jallali v. National Board of Osteopathic Medical Examiners, Inc.*,<sup>144</sup> the court of appeals held that the trial court erred in refusing to dismiss the plaintiff's complaint because the trial court should have deferred to litigation already pending in Florida in the interest of comity.<sup>145</sup> The court of appeals specifically noted, "There is no indication that the Florida lawsuit is not proceeding normally."<sup>146</sup>

On rehearing, the appellee informed the court of appeals that, in fact, the litigation in Florida had been dismissed.<sup>147</sup> Although the court recognized that it typically would not permit a party "to raise issues in petitions for rehearing that were not raised in the original briefs . . . [c]learly, this dismissal [was] vitally important to [its] consideration of the issues raised here, and renders our original opinion factually and legally incorrect."<sup>148</sup> The court expressed its frustration, saying it was "baffled, confused, and puzzled why [the appellee] did not advise [it] of that fact in its first brief."<sup>149</sup> But because "[t]here can be no comity discussion about a case that no longer exists," the court "fe[lt] compelled to take another view of these new facts and do so with the understanding that this is an extraordinarily rare event."<sup>150</sup> Ultimately, the court of appeals reversed the denial of the appellant-defendant's motion to dismiss and entered partial summary judgment in favor of the appellee-plaintiff with respect to certain claims.<sup>151</sup>

---

141. *Id.*

142. *Id.*

143. *Id.* at 21.

144. 902 N.E.2d 902 (Ind. Ct. App.), *rev'd and vacated on reh'g*, 908 N.E.2d 1168 (Ind. Ct. App.), *trans. denied* 919 N.E.2d 553 (Ind. 2009).

145. *Id.* at 907.

146. *Id.* at 906.

147. *Jallali*, 908 N.E.2d at 1172.

148. *Id.*

149. *Id.*

150. *Id.* at 1172-73.

151. *Id.* at 1175-76. In its final footnote, the court noted that although the appellant-defendant had filed a motion for costs pursuant to Appellate Rule 67, the motion was premature because "there is as yet no opinion certified as final in this case under Indiana Appellate Rule 65(E)." *Id.* at 1176 n.4.



*E. Authority to Enter Judgment Under Appellate Rule 66(C)(4)*

In *Gerstbauer v. Styers*,<sup>152</sup> a split panel of the court of appeals reviewed a trial court order awarding attorney fees.<sup>153</sup> The court of appeals had previously addressed an appellate dispute between the parties, reversing the trial court and concluding that the defendant-appellants were entitled to costs and attorney fees pursuant to a contract between the parties.<sup>154</sup> On remand, the defendants presented evidence that they had incurred approximately \$143,000 in attorney fees over the course of the litigation, including trial and appellate work.<sup>155</sup> In response, the plaintiff argued that the defendants' fees were unreasonable and submitted evidence that \$79,577.89 would be a reasonable award.<sup>156</sup>

The trial court held a hearing in which it awarded the defendants \$9500 in attorney fees.<sup>157</sup> In explaining its calculation, the trial court noted that the defendant "won a total judgment for rent of \$13,207.45" and "[i]n order to win this award, [he] . . . expended total attorney fees of" at least \$143,000.<sup>158</sup> The trial court referenced Indiana Rule of Professional Conduct 1.5 and concluded that a reasonable fee should not exceed one-third of the recovery.<sup>159</sup> Additionally, the trial court admitted:

Because of this Court's unfortunate earlier ruling and the need for appellate review for overturning it, the Court believes that there was an additional sum of \$4,250.00 earned as a further reasonable fee (in view of the amounts involved) earned on the direct appeal; ultimately this is where the Judgment amount for [defendants] was best earned and [they] received best value for [their] attorney fee award.<sup>160</sup>

Finally, the trial court awarded an additional \$1000 because the defendant needed to defend the plaintiff's petition for rehearing on appeal, bringing the total attorney fee award to \$9500.<sup>161</sup>

The defendants appealed the trial court's attorney fee award because they believed the trial court had abused its discretion by only awarding \$9500.<sup>162</sup> On appeal, the court of appeals first noted that the appellant-defendants' right to

---

152. 898 N.E.2d 369 (Ind. Ct. App. 2008).

153. *Id.* at 370-71.

154. *Id.* at 374 (summarizing *Capitol Speedway, Inc. v. Styers*, 837 N.E.2d 229 (Ind. Ct. App. 2005) (unpublished table decision)).

155. *Id.* at 375.

156. *Id.* at 376. The plaintiff also argued in the alternative that he should not owe any attorney fees. *Id.* at 375.

157. *Id.* at 377.

158. *Id.* The trial court wrote that the defendants expended \$161,280.00 in attorney fees, but as the court of appeals observed, this figure is approximately \$18,000 greater than what the defendants had alleged. *Id.* at 377 n.1.

159. *Id.* at 377.

160. *Id.*

161. *Id.*

162. *Id.* at 378.

attorney fees was based on a fee-shifting provision in the parties' lease and the "goal of contract interpretation is to ascertain and enforce the parties' intent as manifested in the contract."<sup>163</sup> The court of appeals also observed that the trial court had limited the appellants' attorney fees based on "recovery on [their] breach of contract counter-claim, stating that '[m]ost of the effort for [them had] been to defeat the claims of [the plaintiff], not to win [their] own claim."<sup>164</sup> But the court of appeals concluded that the trial court's interpretation of the fee-shifting provision that a party was only entitled to fees for enforcing a claim, not for defending it, was incorrect.<sup>165</sup> "Thus, having been successful both in [their] defense . . . and in [their] counter-claim, [defendants were], on all counts, the prevailing party" and "entitled to reasonable attorneys' fees incurred both in [their] defense and on [their] counter-claim."<sup>166</sup>

The court of appeals further noted that Professional Conduct Rule 1.5(a) addresses how to bill a client and is not helpful in determining the objective reasonableness of charges.<sup>167</sup> Additionally, although the total fees may initially appear excessive given the amount at issue in the litigation, "an appearance on its face is a subjective impression, not an objective determination."<sup>168</sup> Because the trial court "misapplied the law," the court of appeals reversed the award of attorney fees.<sup>169</sup> But instead of remanding the "ten-year-old litigation to the trial court yet again[,] the court of appeals cited Appellate Rule 66(C)(4) as authority to "order entry of judgment of damages in the amount supported by the evidence."<sup>170</sup> The court of appeals cited the plaintiff's concession to the trial court at the fee hearing that \$79,577.89 would be reasonable and awarded that amount to the defendant.<sup>171</sup> The court noted,

Under most circumstances, we would remand the question of a reasonable sum of attorneys' fees to the trial court . . . [b]ut given our authority under Appellate Rule 66(C)(4) to enter judgment in the amount supported by the evidence, [plaintiff-appellee's] concession that \$79,577.89 is reasonable, and [defendants'] specific request for this court to "calculate its own award," we find this disposition appropriate.<sup>172</sup>

Judge May dissented from the majority's opinion on the ground that she "would remand so the trial court could properly recalculate attorney fees based on its analysis of the evidence before it in light of the legal standards the majority

---

163. *Id.* at 378-79 (citing *Gregg v. Cooper*, 812 N.E.2d 210, 215 (Ind. Ct. App. 2004)).

164. *Id.* at 379 (quoting trial court order).

165. *Id.* at 380.

166. *Id.*

167. *Id.* at 381.

168. *Id.*

169. *Id.* at 382.

170. *Id.* (quoting IND. APP. R. 66(C)(4)).

171. *Id.* at 382 n.4.

172. *Id.*



[had] articulated.”<sup>173</sup> Although Judge May recognized that the court of appeals could “in certain situations direct final judgment without new factfinding, [] ‘this power is to be utilized only if the court is reviewing a pure question of law or a mixed question of law and fact.’”<sup>174</sup> The determination of appropriate attorney fees required the court to resolve an issue of disputed material fact and “[b]ecause the majority [had] reweighed the evidence, its award [was] not a proper application of [its] authority under App. Rule 66(C)(4).”<sup>175</sup> Judge May concluded, “I fully appreciate the majority’s reluctance to remand when doing so would undoubtedly extend this remarkably lengthy litigation. But our standard of review requires it, and I would not usurp the trial court’s factfinding authority for the sole purpose of bringing this action to an earlier resolution.”<sup>176</sup>

#### IV. COURT GUIDANCE FOR APPELLATE PRACTITIONERS

##### *A. Failure to Comply with Appellate Rules May Result in Dismissal*

As discussed in last year’s appellate procedure Survey article, the court of appeals lowered the figurative “boom” on the appellant in *Galvan v. State*<sup>177</sup> and dismissed his appeal “[d]ue to flagrant violations of the appellate rules.”<sup>178</sup> During this reporting term, another panel of the court of appeals followed *Galvan* and dismissed an appeal in an unpublished memorandum decision “[g]iven the numerous and flagrant violations of the appellate rules.”<sup>179</sup> The *Bedree* appellant failed to provide the court with copies of any orders or pleadings, filed an untimely notice of appeal, and waived his claims by failing to present adequate “facts, authority, or argument” supporting his claims, among other violations.<sup>180</sup> Although these violations were an extreme instance of “blatant[] disregard[] [for] our appellate rules[,]”<sup>181</sup> appellate practitioners should carefully abide by the Appellate Rules to avoid being “*Galvan-ized*”<sup>182</sup> by an appellate court.

---

173. *Id.* at 384 (May, J., dissenting).

174. *Id.* (quoting *Rebel v. Nat’l City Bank of Evansville*, 598 N.E.2d 1108, 1111 (Ind. Ct. App. 1992)).

175. *Id.* at 384-85.

176. *Id.* at 385.

177. 877 N.E.2d 213 (Ind. Ct. App. 2007).

178. Bryan H. Babb & Kellie M. Barr, *Developments in Indiana Appellate Procedure: Rule Amendments, Notable Case Law, and Tips for Appellate Practitioners*, 42 IND. L. REV. 813, 833-34 (2009) (quoting *Galvan*, 877 N.E.2d at 216).

179. *Bedree v. Darling*, No. 02A05-0902-CV-112, 2009 Ind. App. Unpub. LEXIS 1041, at \*7 (Ind. Ct. App. Aug. 14, 2009).

180. *Id.* at \*1 n.2, \*3, \*5.

181. *Id.* at \*5.

182. The definition of “galvanized” is “to stimulate or excite as if by an electric shock,” which captures the panic that would presumably ensue from an appellate court citing *Galvan* in your case. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 513 (11th ed. 2004).

### B. Do Not Incorporate Filings By Reference in a Brief

Appellate Rule 46(A)(8)(a) provides, “The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning.”<sup>183</sup> Appellate Rule 46(B)(2) provides that an appellee’s argument “shall address the contentions raised in the appellant’s argument.”<sup>184</sup> The court of appeals held in *T-3 Martinsville* that an appellee’s brief “violate[d] these rules by attempting to ‘incorporate by reference’ more than a hundred pages from other documents, including [its] answer to the complaint, all three of its summary judgment motions, and its response to [the appellants’] motion for summary judgment.”<sup>185</sup> Accordingly, the court of appeals only considered the actual arguments presented in the appellee’s brief.<sup>186</sup>

### C. Appealed Judgment Must Appear in Appellant’s Brief and Appendix

Appellate Rule 46(A)(10) provides, “The [appellant’s] brief shall include any written opinion, memorandum of decision or findings of fact and conclusions thereon relating to the issues raised on appeal.”<sup>187</sup> Appellate Rule 50(A)(2)(b) provides that the appellant’s appendix shall include “the appealed judgment or order, including any written opinion, memorandum of decision, or findings of fact and conclusions thereon relating to the issues raised on appeal.”<sup>188</sup> The court of appeals reminded the appellant in *Highland Springs South Homeowners Ass’n v. Reinstatler*<sup>189</sup> that these rules both apply, which required the appellant to include the appealed judgment in both its brief and appendix, not just one or the other.<sup>190</sup>

### D. Learn Appellate Rules Governing Appendices

The court of appeals has also noted, “it is incumbent upon the parties to present [the court of appeals] with a complete appellate appendix.”<sup>191</sup> During this reporting term, the court noted that it “has seen an increase in the filing of incomplete appendices” and “strongly caution[ed] counsel to familiarize themselves with the appellate rules governing the filing of appendices.”<sup>192</sup>

183. IND. APP. R. 46(A)(8)(a).

184. IND. APP. R. 46(b)(2).

185. *T-3 Martinsville, LLC v. U.S. Holding, LLC*, 911 N.E.2d 100, 104 n.3 (Ind. Ct. App.), *aff’d on reh’g*, 916 N.E.2d 205 (Ind. Ct. App. 2009), *trans. denied*, 2010 Ind. LEXIS 174 (Ind. Feb. 25, 2010).

186. *Id.*

187. IND. APP. R. 46(A)(10).

188. IND. APP. R. 50(A)(2)(b).

189. 907 N.E.2d 1067 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 560 (Ind. 2009).

190. *Id.* at 1071 n.1.

191. *Paoli Mun. Light Dep’t v. Orange County Rural Elec. Membership Corp.*, 904 N.E.2d 1280, 1282 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 548 (Ind. 2009).

192. *Id.* (citing *Kovach v. Alpha Pharma, Inc.*, 890 N.E.2d 55, 65 (Ind. Ct. App. 2008), *trans. granted*, 915 N.E.2d 983 (Ind.), *opinion vacated by* 913 N.E.2d 193 (Ind. 2009); *Motorists Mut.*



Because both parties failed to include sufficient materials in their appendices necessary for appellate review, the court ordered the appellant “to submit a supplemental appendix containing all documents necessary for resolution of the issue raised on appeal.”<sup>193</sup>

In a different case, some parties included duplicative materials in their appendices, causing the court of appeals to remind them:

[W]e do not need two identical copies of the record in order to perform our review. As such, the provision of two copies is a waste of paper that merely bloats the record on appeal. We refer counsel to Indiana Appellate Rule 50, which describes the proper contents of an appendix, including, among other things, only those portions of the transcript and exhibits that are relevant to the issues on appeal.<sup>194</sup>

#### *E. Statement of Case and Statement of Facts*

In *Ruse v. Bleeke*, the appellant cited his proposed findings of fact in his appendix as his Statement of Facts for his appellant’s brief.<sup>195</sup> The court of appeals reminded the appellant that

Appellate Rule 46(A)(6) provides that an appellant’s brief shall contain a Statement of the Facts section which shall describe the facts relevant to the issues presented for review. Furthermore, a Statement of Facts should be a concise narrative of the facts stated in the light most favorable to the judgment and should not be argumentative.<sup>196</sup>

Although “several documents may be included in an Appellant’s Appendix, [] a section of the contents of the Appellant’s Brief [*i.e.*, a party’s proposed Statement of Facts] is not among those listed.”<sup>197</sup>

In *Nealy v. American Family Mutual Insurance Co.*,<sup>198</sup> the court noted that the Statement of the Case and Statement of Facts in the appellee’s brief was “nearly devoid of references to the record required by Ind. Appellate Rules 22(C), 46(A)(5) and (6), and 46(B).”<sup>199</sup> As such, the court relied on the appellants’ brief for that information and reminded appellee’s counsel that “we will not search the record to find a basis for a party’s argument.”<sup>200</sup>

---

v. Wroblewski, 898 N.E.2d 1272, 1274-75 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 989 (Ind. 2009)).

193. *Id.*

194. *Lawson v. Hale*, 902 N.E.2d 267, 269 n.1 (Ind. Ct. App. 2009); *see also* *B.W. v. State*, 909 N.E.2d 471, 473 n.1 (Ind. Ct. App. 2009).

195. 914 N.E.2d 1, 5 n.1 (Ind. Ct. App. 2009).

196. *Id.*

197. *Id.* (citing IND. APP. R. 50(A)(2)); *see also* *Gulf Stream Coach, Inc. v. Cronin*, 903 N.E.2d 109, 111 n.1 (Ind. Ct. App. 2009) (noting that a one sentence statement of facts is inappropriate).

198. 910 N.E.2d 842 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 559 (Ind. 2009).

199. *Id.* at 845 n.2.

200. *Id.* (citing *Young v. Butts*, 685 N.E.2d 147, 151 (Ind. Ct. App. 1997)).

In *Indiana High School Athletic Ass'n v. Schafer*,<sup>201</sup> the court of appeals noted, "The statements of facts in both parties' briefs [were] rife with argument, which is inappropriate in that part of an appellate brief."<sup>202</sup> The court regarded both parties' statements of facts as "transparent attempts to discredit the opponents," and "plainly not intended to be a vehicle for informing this court."<sup>203</sup> Likewise, an appellant's contention that its argumentative statement of facts is "simply explaining what it considers deficiencies with the ALJ's finding" is "not [] in accordance with the standard of review appropriate to the judgment or order being appealed."<sup>204</sup>

#### *F. Keep Summary of Argument Succinct to Focus Court's Review*

Appellate Rule 46(A)(7) provides that the summary of the argument "should contain a succinct, clear, and accurate statement of the arguments made in the body of the brief."<sup>205</sup> The Rule also provides, "It should not be a mere repetition of the argument headings,"<sup>206</sup> which conveys that the summary of the argument should contain substantive material. Nevertheless, the court of appeals reminded a party that an overly detailed summary of the argument "does little to help focus our review."<sup>207</sup> Although striking the appropriate balance between a basic summary and a bloated summary may be a challenge, the court's admonishment conveys its interest in using the summary of the argument to focus its review for the issues on appeal.

#### *G. Disobeying Previous Order Runs Risk of Attorney Fee Award*

In *Lemon v. Wishard Health Services*,<sup>208</sup> the appellee filed a motion to strike the appellant's reply brief.<sup>209</sup> The "same day" the appellant had filed her opening brief, she had also "filed a motion requesting leave to rely on an affidavit" from her attorney that was not part of the record and that supported an argument not made to the trial court, "notwithstanding the fact that [the appellant] had already cited the affidavit as evidence in her [appellant's] brief."<sup>210</sup> The appellee moved thereafter to strike her brief, and "the appellant filed a second motion, this time requesting to supplement the record with a deposition [from an] . . . unrelated case."<sup>211</sup> The motions panel of the court of appeals denied the appellant's

---

201. 913 N.E.2d 789 (Ind. Ct. App. 2009).

202. *Id.* at 791-92 n.2 (citing IND. APP. R. 46(A)(6)).

203. *Id.*

204. *Beaty Constr., Inc. v. Bd. of Safety Review*, 912 N.E.2d 824, 826 n.1 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 556 (Ind. 2009) (citing IND. APP. R. 46(A)(6)(b)).

205. IND. APP. R. 46(A)(7).

206. *Id.*

207. *Dickerson v. Strand*, 904 N.E.2d 711, 714 n.3 (Ind. Ct. App. 2009).

208. 902 N.E.2d 297 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 551 (Ind. 2009).

209. *Id.* at 299 n.2.

210. *Id.*

211. *Id.*



motions and struck her brief, ordering her to file a new brief that did not reference the new argument or evidence outside the record.<sup>212</sup>

Although the appellant complied and filed a modified opening brief, she returned to the new argument in her reply brief and again cited the unrelated deposition. The appellee filed another motion to strike, and the court of appeals held, “Even more indefensible are [the appellant’s] counsel’s decisions to assert an argument not made to the trial court and to rely on information not in the record—in direct violation of our previous order.”<sup>213</sup> The court of appeals granted the appellee’s motion to strike and noted,

[W]e considered awarding the appellee its attorney fees incurred in preparing the motion to strike. Inasmuch as that would require a remand to the trial court for a calculation of reasonable fees incurred, however, and given that the motion to strike was relatively brief, we concluded that [the appellee’s] attorneys would, in all likelihood, end up spending more preparing for a fee hearing than they would have been awarded at the end of that hearing. We caution [appellant’s] counsel, however, that if this type of behavior reoccurs in the future, we will not hesitate to exercise our authority pursuant to Appellate Rule 66(E) and make a *sua sponte* decision to award appellate attorney fees to the opposing party.<sup>214</sup>

Although the court did not award attorney fees pursuant to its inherent power, counsel must be careful to follow the Appellate Rules and the court’s previous orders to avoid a *sua sponte* award as cautioned in *Lemon*.

## V. INDIANA’S APPELLATE COURTS

### A. Case Data from the Supreme Court

During the 2009 fiscal year,<sup>215</sup> the supreme court disposed of 1163 cases,<sup>216</sup> issuing 188 majority opinions and published dispositive orders.<sup>217</sup> Approximately fifty-two percent of these dispositions were criminal; thirty percent were civil; eleven percent were attorney discipline cases; three percent were original actions; and less than one percent each were tax or judicial discipline cases.<sup>218</sup> The supreme court heard oral argument in seventy-eight cases; forty-six of these cases were civil; thirty-one were criminal; and one was an attorney discipline case.<sup>219</sup>

---

212. *Id.*

213. *Id.*

214. *Id.*

215. The supreme court’s 2009 fiscal year ran from July 1, 2008, through June 30, 2009. See INDIANA SUPREME COURT ANNUAL REPORT 2008-2009, at 1 (2009), available at <http://www.in.gov/judiciary/supremeadmin/docs/0809report.pdf>.

216. *Id.* at 43.

217. *Id.* at 44.

218. *Id.* at 43.

219. *Id.* at 45.

*B. The Court of Appeals Takes Important Steps to Protect the Environment*<sup>220</sup>

In 2009, the court of appeals became the first court in the country to be recognized by the American Bar Association (ABA) and the Environmental Protection Agency (EPA) as a "Law Office Climate Challenge Partner."<sup>221</sup> This program is designed "to encourage law offices to take simple, practical steps to become better environmental and energy stewards. Law offices and organizations may participate by adopting best practices for office paper management or by joining at least one of three voluntary EPA partnership programs."<sup>222</sup>

As part of this initiative,

the [Indiana Court of Appeals] has taken a number of steps to improve the environment, including implementing a paper recycling plan in all offices, changing purchasing practices such that all copier and printer paper is 100% recycled and other office supplies are 30-100% recycled content, and implementing a policy whereby opinions to be handed down are circulated electronically instead of making a hard copy for each office.<sup>223</sup>

Furthermore, "[i]n addition to becoming a Law Office Climate Challenge Partner, the Court of Appeals of Indiana has also been recognized by the [EPA] as a WasteWise Partner."<sup>224</sup> WasteWise is a voluntary program that targets the reduction of municipal solid waste and certain industrial wastes.<sup>225</sup> Municipal solid waste includes materials that commonly end up in organizations' trash, such as corrugated containers, paper, yard trimmings, packaging, and wood pallets.<sup>226</sup>

#### CONCLUSION

This survey term marked another productive year for Indiana's appellate courts. Although the Appellate Rules were redrafted ten years ago, Indiana's courts continue to interpret and apply these rules to refine appellate practice and enhance the efficiency of our judicial system. Indiana's citizens, bench, and bar all benefit from the noble efforts of our appellate courts in this arena.

---

220. The court of appeals' annual report for 2009 was not released in time to incorporate it into this survey.

221. See Press Release, Court of Appeals of Indiana Becomes Law Office Climate Challenge Partner, April 27, 2009, available at <http://www.in.gov/judiciary/press/2009/0427.html>.

222. The ABA-EPA Law Office Climate Challenge, <http://www.abanet.org/enviro/climatechallenge/partners.shtml> (last visited May 9, 2010).

223. Press Release, *supra* note 221.

224. *Id.*

225. For more information about WasteWise, see WasteWise Program, <http://www.epa.gov/waste/partnerships/wastewise/index.htm> (last visited Aug. 5, 2010).

226. *Id.*



# RECENT DEVELOPMENTS IN INDIANA BUSINESS AND CONTRACT LAW

MICHAEL A. DORELLI\*  
PHILLIP T. SCALETTA\*\*

During the survey period,<sup>1</sup> Indiana courts rendered a number of significant decisions affecting businesses, as well as their owners, officers, directors, and shareholders. These developments of interest to business litigators and corporate transactional lawyers, as well as business owners and in-house counsel, are discussed herein.

## I. “PRE-EXISTING” DERIVATIVE CLAIMS

In *Long v. Biomet, Inc.*,<sup>2</sup> the court held that former shareholders of a corporation that merged with a second company lacked standing to continue their “pre-existing” or pre-merger derivative actions against former officers and directors of the “acquired” company, because they no longer owned shares in the company.<sup>3</sup> In doing so, the court of appeals engaged in a discussion of three significant Indiana Supreme Court decisions—*Gabhart*,<sup>4</sup> *Fleming*,<sup>5</sup> and *Galligan*<sup>6</sup>—applying those decisions to the issue of a former shareholder’s standing to pursue a “pre-existing” derivative action.

The plaintiffs were shareholders of Biomet, Inc., an Indiana corporation and publicly traded company.<sup>7</sup> They “filed two substantively identical shareholder-derivative complaints” against Biomet officers and directors, alleging breaches of fiduciary duties relating to improper stock option backdating.<sup>8</sup> Biomet subsequently announced that it was merging—through a stock sale—to a consortium of private-equity investors.<sup>9</sup> A special committee of Biomet’s board of directors ultimately concluded that pursuit of the derivative litigation was not in the company’s best interests, and a tender off was completed under which

---

\* Partner, Hoover Hull LLP, Indianapolis, Indiana. B.S., 1994, Indiana University—Bloomington; J.D., 1998, *magna cum laude*, Indiana University School of Law—Indianapolis. The views expressed herein are solely those of the authors.

\*\* Associate, Hoover Hull LLP, Indianapolis, Indiana. B.S., 2002, Purdue University—West Lafayette; J.D., 2008, *magna cum laude*, Indiana University Maurer School of Law—Bloomington.

1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period—i.e., from October 1, 2008, through September 30, 2009.

2. 901 N.E.2d 37 (Ind. Ct. App. 2009).

3. *Id.* at 43-44.

4. *Gabhart v. Gabhart*, 370 N.E.2d 345 (Ind. 1977).

5. *Fleming v. Int’l Pizza Supply Corp.*, 676 N.E.2d 1051 (Ind. 1997).

6. *Galligan v. Galligan*, 741 N.E.2d 1217 (Ind. 2001).

7. *Long*, 901 N.E.2d at 38.

8. *Id.* at 39.

9. *Id.*

more than eighty percent of Biomet's shareholders were cashed out.<sup>10</sup> Biomet was merged with a corporate entity affiliated with the private-equity investors and the remaining Biomet public shareholders, including the plaintiffs, received a cash payment for their Biomet stock.<sup>11</sup>

The defendant officers and directors moved to dismiss the plaintiffs' claims, arguing that as a result of the sale, the plaintiffs no longer held any stock in the company and, as such, lacked standing to maintain the derivative lawsuit.<sup>12</sup> In response, the plaintiffs argued "that derivative claims brought before a merger could continue after the merger is consummated."<sup>13</sup> According to the plaintiffs, their remedy was not limited to the appraisal procedure found in the dissenters' rights statute, because they were not challenging the merger itself or whether they received "a fair price in light of Biomet's condition at the time of the merger."<sup>14</sup> The trial court agreed with the defendants and dismissed the plaintiffs' claims on standing grounds.<sup>15</sup>

On appeal, the court in *Biomet* first distinguished the Indiana Supreme Court's decision in *Gabhart v. Gabhart*,<sup>16</sup> which "'h[e]ld that a proposed merger which ha[d] no valid purpose' could be challenged 'by procedures other than those provided by statute for that purpose.'"<sup>17</sup> The court in *Biomet* quoted *Gabhart* as follows:

[B]eing a shareholder of the corporation whose cause of action is to be enforced in a derivative suit is a prerequisite for standing to sue. . . . [W]hen a corporation is merged out of existence, . . . its assets and liabilities are transferred to the surviving corporation by operation of law, . . . and the shareholders' interests in the merged corporation come[] to an end. . . . Thus, any cause of action "passes to the surviving corporation along with the other assets of the merged corporation."<sup>18</sup>

The court in *Biomet* distinguished *Gabhart* in that the plaintiffs in the present case were not claiming that the Biomet sale was devoid of any "legitimate corporate purpose," nor did they allege that the purchasers had "participated in" the alleged wrongdoing.<sup>19</sup>

The court in *Biomet* then analyzed the Indiana Supreme Court's decision in *Fleming v. International Pizza Supply Corp.*,<sup>20</sup> which held: "[I]n a merger or asset sale, the exclusive remedy for the value of the shareholder's shares is the

---

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* (internal quotations omitted).

14. *Id.* at 41 (internal quotations omitted) (citing IND. CODE § 23-1-44-8(a)-(c) (Supp. 2009)).

15. *Id.* at 40.

16. 370 N.E.2d 345 (Ind. 1977).

17. *Long*, 901 N.E.2d at 40 (citing *Gabhart*, 370 N.E.2d at 356).

18. *Id.* (quoting *Gabhart*, 370 N.E.2d at 357).

19. *Id.* at 41 (quoting *Gabhart*, 370 N.E.2d at 357).

20. 676 N.E.2d 1051 (Ind. 1997).



statutory appraisal procedure [which remedy included] the ability of dissenting shareholders to litigate their breach of fiduciary duty or fraud claims *within the appraisal proceeding*.”<sup>21</sup> The plaintiffs in *Biomet* argued for their continued standing in reliance, in part, on a footnote in *Fleming*, which provided “that the [Business Corporation Law] did not intend to restrict any claims of wrongdoing that a corporation or shareholder brings before the corporate action creating dissenters’ rights occurs.”<sup>22</sup> The court of appeals in *Biomet* disagreed, explaining that the plaintiffs’ argument disregards the “subsequent statement [in *Fleming*] regarding resolution of a claim to recover money from a wrongdoing officer that ‘is not yet resolved at the time the fair value of the dissenters’ shares is established’ in the dissenters’ rights proceeding.”<sup>23</sup>

Finally, the plaintiffs argued that they had standing to pursue their “pre-existing” derivative claim based on the Indiana Supreme Court’s decision in *Galligan v. Galligan*,<sup>24</sup> which ruled that “‘dissenters’ rights are the exclusive remedy afforded for actions or omissions in a merger or asset sale, but failure to afford the dissenters’ rights remedy is an independent wrong that is not itself subject to the dissenters’ rights provision.’”<sup>25</sup> The court in *Biomet* again disagreed, explaining that “[h]ere, [p]laintiffs do not claim that [the officer and director defendants] breached a dissenters’ rights statutory duty, as in *Galligan*.”<sup>26</sup> The court also reasoned that “to find that *Galligan*’s reference to an ‘independent wrong that is not itself subject to the dissenters’ rights statute’ created an exception so as to permit proceeding other than within the statutory framework would eviscerate the statute’s expressed intent and the holding of [*Fleming*].”<sup>27</sup>

In summary, the court in *Biomet* ruled that plaintiffs with “pre-existing” derivative claims for breach of fiduciary duty—i.e., claims that pre-date a merger or other transactional disposition of their shares—do not retain standing to pursue their derivative claims following the merger or other transaction.<sup>28</sup> Rather, unless, as in *Galligan*, the plaintiffs are specifically denied their statutory dissenters’ rights, their exclusive remedy lies with statutory appraisal:

[D]espite [p]laintiffs’ repeated and heated contention that they are not challenging the asset sale or claiming that their shares of stock were worth more than . . . they received at the time of the sale, they undeniably seek additional compensation for those shares, and our Supreme Court has clearly held that a claim as to the value of

---

21. *Long*, 901 N.E.2d at 42 (quoting *Fleming*, 676 N.E.2d at 1056, 1057 (emphasis added by *Biomet* court)).

22. *Id.* (quoting *Fleming*, 676 N.E.2d at 1057 n.9).

23. *Id.* at 43 (quoting *Fleming*, 676 N.E.2d at 1057 n.9).

24. 741 N.E.2d 1217 (Ind. 2001).

25. *Long*, 901 N.E.2d at 43 (quoting *Galligan*, 741 N.E.2d at 1225-26).

26. *Id.*

27. *Id.*

28. *Id.*

shareholders' shares in an asset sale is a matter to be determined in the context of the appraisal process.<sup>29</sup>

The court of appeals affirmed the trial court's dismissal of the plaintiffs' derivative claims on standing grounds.<sup>30</sup>

## II. CORPORATE, SHAREHOLDER, AND MEMBER LIABILITY

### A. *Liability of a Successor Corporation*

In *Cooper Industries, LLC v. City of South Bend*,<sup>31</sup> the Indiana Supreme Court held that the defendant corporation was a corporate successor, potentially liable for its predecessor's environmental contamination in an environmental legal action (ELA), under either the "de facto merger" or "mere continuation" doctrines.<sup>32</sup> In *Cooper Industries*, the trial court entered summary judgment, on statute of limitations grounds, against the City of South Bend on the City's common law claims against Cooper alleging environmental damages.<sup>33</sup> But the trial court ruled that the City's ELA claim could not have accrued until the legislature enacted the statute in 1998 and, as such, it was timely.<sup>34</sup> Both parties moved for summary judgment on whether Cooper was the corporate liability successor of Studebaker Corp., which operated a manufacturing facility on the property when the environmental damage allegedly occurred.<sup>35</sup> The trial court granted the City's summary judgment motion on the issue of successorship.<sup>36</sup> Cooper appealed.<sup>37</sup>

The court in *Cooper Industries* recognized that "[u]nder Indiana law, where a corporation purchases the assets of another, the buyer does not assume the liabilities of the seller."<sup>38</sup> But the court concluded that the trial court properly granted summary judgment on Cooper's successor liability under the "de facto merger" or "mere continuation" doctrines.<sup>39</sup>

Applying Indiana law,<sup>40</sup> the court explained that "[c]ourts sometimes treat

---

29. *Id.* (citing *Fleming*, 676 N.E.2d at 1057).

30. *Id.* at 44.

31. 899 N.E.2d 1274 (Ind. 2009).

32. *Id.* at 1291.

33. *Id.* at 1278.

34. *Id.* at 1278-79.

35. *Id.* at 1278.

36. *Id.*

37. *Id.* at 1279.

38. *Id.* at 1287 (citing *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228 (Ind. 1994)).

39. *Id.* at 1288.

40. *Id.* at 1290-91. The court in *Cooper Industries* described its rationale for choosing Indiana law over Delaware law, where Cooper was incorporated, as follows:

The fact the successor corporation was incorporated in Delaware does not control. While the law of the state of incorporation may determine issues relating to the internal affairs of a corporation, different principles apply where the rights of third parties



asset transfers as de facto mergers where the economic effect of the transaction makes it a merger in all but name.”<sup>41</sup> In determining whether a de facto merger has occurred, “[s]ome pertinent findings might include continuity of the predecessor corporation’s business enterprise as to management, location, and business lines; prompt liquidation of the seller corporation; and assumption of the debts of the seller necessary to the ongoing operation of the business.”<sup>42</sup>

In the present case, Studebaker and Worthington Corporation combined to form Studebaker-Worthington (S-W), after which both predecessors ceased to exist.<sup>43</sup> S-W expressly assumed Studebaker’s liabilities, and both proxy statements and annual reports to shareholders showed that Studebaker’s divisions, subsidiaries, and products became the divisions, subsidiaries, and products of S-W.<sup>44</sup> In 1979, McGraw-Edison Company (“McGraw”) acquired all of S-W’s shares.<sup>45</sup> In 2004, McGraw merged into Cooper.<sup>46</sup> The court held that, under these circumstances, the transaction at issue constituted a de facto merger.<sup>47</sup>

The court then evaluated Cooper’s successor liability under the doctrine of “mere continuation,” which “asks whether the predecessor corporation should be deemed simply to have re-incarnated itself.”<sup>48</sup> A mere continuation analysis involves consideration of several factors, including “whether there is a continuation of shareholders, directors, and officers into the new entity.”<sup>49</sup> In the present case, the stockholders, directors and officers of Studebaker and Worthington Corporation became the “respective players” in S-W.<sup>50</sup> After analyzing the transactions leading to S-W’s ownership of “selected assets” of Studebaker, the court in *Cooper Industries* concluded that S-W was a “mere continuation of the earlier corporate forms.”<sup>51</sup>

---

external to the corporation are at issue.

...

This case is a claim about property damage. The injury occurred in Indiana. The law of the place of the wrong occurred (*lex loci delicti*) governs. In disputes such as this, particularly because it involves a third person, the law of the state with the most significant relationship to the dispute—here Indiana—applies.

*Id.* at 1290-91 (internal citations omitted).

41. *Id.* at 1288.

42. *Id.* (citations omitted).

43. *Id.* at 1289.

44. *Id.*

45. *Id.* at 1278.

46. *Id.*

47. *Id.* at 1290.

48. *Id.*

49. *Id.*

50. *Id.* (citations omitted).

51. *Id.* at 1290-91. The court in *Cooper Industries* also affirmed the trial court’s ruling that the ELA claims could not have accrued until the statute was enacted and that, as such, the claims were not time-barred. *Id.* at 1286.

*B. Personal Liability of LLC Member*

In *Perkins v. Brown*,<sup>52</sup> the court of appeals held that an “outside accounting” of a limited liability company’s (LLC) finances was required before the trial court could properly award damages in the company’s dissolution matter, and that the trial court erred in imposing personal liability against one of the LLC’s members in the absence of such an accounting.<sup>53</sup> In *Perkins*, disputes arose between the two members of an LLC regarding compensation, ownership, and communication issues.<sup>54</sup> This ultimately lead one member to file an action requesting a declaratory judgment as to the parties’ respective ownership percentages, an equitable accounting of the company, and the dissolution of the company, followed by a distribution of the net remaining assets.<sup>55</sup>

At trial, the plaintiff-member “submitted evidence of what he believed to be an estimate of” the company’s income, account receivables, and expenses, utilizing assumptions based on the company’s “historical practice.”<sup>56</sup> Ultimately, the trial court granted judgment in favor of the plaintiff and against both the company and the defendant-member, individually.<sup>57</sup> The defendant filed a motion to correct error, which the court denied. The defendant then appealed.<sup>58</sup>

On appeal, the defendant-member argued that no evidence was presented at trial supporting a veil-piercing analysis, or that he authorized unlawful distributions resulting in the company’s insolvency—i.e., no evidence was presented supporting the imposition of personal liability against him.<sup>59</sup> The court agreed, explaining the statutory prerequisite to the imposition of personal liability on a member of an LLC as follows: “The Indiana Business Flexibility Act provides that a member of an LLC may be held personally liable to the LLC if the member ‘votes for or assents to a distribution in violation of the operating agreement or section 6 of this chapter.’”<sup>60</sup> The court acknowledged that there was no evidence that the operating agreement governed the issue.<sup>61</sup> As such, the court turned to section 6, which provides essentially that “a member may authorize a distribution . . . as long as the distribution does not result in the LLC becoming insolvent.”<sup>62</sup>

The court in *Perkins* found that the trial court erred when it determined the

---

52. 901 N.E.2d 63 (Ind. Ct. App. 2009).

53. *Id.* at 67.

54. *Id.* at 64-65.

55. *Id.*

56. *Id.* at 65.

57. *Id.*

58. *Id.*

59. *Id.* at 66.

60. *Id.* (quoting IND. CODE § 23-18-5-7(a) (1999) (emphasis added)).

61. *Id.*

62. *Id.* (citing IND. CODE § 23-18-5-6(a) (1999); *Jackson v. Farmers State Bank*, 481 N.E.2d 395, 403 n.7 (Ind. Ct. App. 1985)).



amount of damages “without ordering an outside accounting of the LLC’s finances.”<sup>63</sup> The court explained that

[w]ithout any direct evidence regarding [the company’s] finances or whether [the defendant-member] authorized any unlawful distributions . . . the trial court was unable to accurately determine if [the company] received all of the money that it was owed under its outstanding invoices, who the creditors of the LLC were, what [the company’s] actual expenses were, and if [its] accounts receivables would have covered the expenses.<sup>64</sup>

According to the court of appeals, “[t]hese procedural steps were necessary to obtain an accurate, equitable accounting of [the company’s] finances at the time of dissolution and to guarantee that each party is awarded its proper share of the assets.”<sup>65</sup>

The court in *Perkins* reversed the trial court’s orders and remanded the case “with instructions for the trial court to order and oversee an outside accounting of [the company’s] finances in order to determine proper distribution to the LLC’s creditors as well as to [the members].”<sup>66</sup> The court also ordered that after the accounting is completed, the trial court would “make an appropriate entry of damages due to each party, including any determination of personal liability . . . under the Indiana Business Flexibility Act.”<sup>67</sup>

### C. Corporate “Knowledge” of Sole Shareholder’s Criminal Act

In *Cantrell v. Putnam County Sheriff’s Department*,<sup>68</sup> the court held that a corporate officer and sole shareholder’s knowledge of cocaine in a vehicle could be imputed to the corporation, supporting the State’s forfeiture of the corporate-owned vehicle.<sup>69</sup> In November 2005, Cantrell, the president and sole shareholder of the defendant-corporation, went on a hunting trip, and drove a Cadillac Escalade owned by the corporation.<sup>70</sup> On his return from the trip, Cantrell was stopped by a police officer, who found six grams of cocaine in the Escalade.<sup>71</sup> Cantrell was convicted of possession of cocaine, and the State filed a complaint for forfeiture of the Escalade.<sup>72</sup> After a bench trial, forfeiture was granted, and the corporation appealed.<sup>73</sup>

---

63. *Id.* at 67.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. 894 N.E.2d 1081 (Ind. Ct. App. 2008).

69. *Id.* at 1088.

70. *Id.* at 1083.

71. *Id.*

72. *Id.*

73. *Id.*

After rejecting the corporations argument that the trial court improperly “pierced the corporate veil” to reach the corporation’s asset,<sup>74</sup> the court explained that the issue was whether “the Corporation ‘knew or had reason to know that [the Escalade] was being used in the commission of [Cantrell’s] offense.’”<sup>75</sup> According to the court:

This raises the question: how can a corporation “know” or “have reason to know”? “A corporation cannot see or know anything except by the eyes or intelligence of its officer; and a corporate body, as a legal entity, cannot itself have knowledge.” “If it can be said to have knowledge at all, that must be the imputed knowledge of some corporate agent.”<sup>76</sup>

The court proceeded to describe the law regarding imputation of an agent’s knowledge to a corporation:

Indiana courts have held that, generally, the knowledge of an agent acquired while acting in the course of employment will be imputed to the corporation.

...

As an exception to the general rule, if an agent commits an independent fraud for his own benefit, or acts adverse to the interest of the principal, he ceases to act as an agent and his knowledge will not be imputed.

...

However, there is also an exception to the exception: where an adverse agent is also the sole representative of the principal in the transaction in question, the principal may once again be charged with the agent’s knowledge.<sup>77</sup>

Concluding that the “exception to the exception” applied in this case, the court reasoned that “Cantrell, as sole shareholder and president of the Corporation, would directly benefit by a denial of the State’s forfeiture request.”<sup>78</sup> The court adopted the trial court’s concern that if Cantrell’s “logic is to be followed, then all people transporting drugs would just incorporate themselves for the avoidance of forfeiture actions.”<sup>79</sup> Therefore, the court held “that, under these circumstances, Cantrell’s knowledge of the cocaine should be

---

74. *Id.* at 1086 (“Here, the State was not attempting to pierce the corporate veil to recover from the shareholder, Cantrell. Rather, the state was attempting to seize the Corporation’s vehicle as a result of Cantrell’s actions.”).

75. *Id.* (quoting IND. CODE § 34-24-1-4(a) (2008)).

76. *Id.* (internal citations omitted).

77. *Id.* at 1086-87 (internal citations omitted).

78. *Id.* at 1088.

79. *Id.* (internal quotations omitted).



imputed to the Corporation.”<sup>80</sup>

### III. FIDUCIARY DUTIES OWED TO FORMER SHAREHOLDERS AND MEMBERS

In *Abdalla v. Qadorh-Zidan*,<sup>81</sup> the court held, as a matter of first impression, that a corporation and several LLCs owed fiduciary duties to their former shareholders and members regarding the preparation of tax returns for a period prior to the members’ and shareholders’ termination of their relationship.<sup>82</sup> Specifically, the corporation and LLCs prepared tax returns after the shareholders’ and members’ relationship terminated but for a pre-termination period.<sup>83</sup> The companies argued that applicable statutes, as well as language in their operating agreements and the settlement agreement (terminating the relationship), supported their position that the shareholders and members relinquished their rights as members and shareholders upon termination of the relationship.<sup>84</sup> The companies also relied on Seventh Circuit Court of Appeals authority, which provides that “[a] partner is a fiduciary of his partners, but not of his former partners, for the withdrawal of a partner terminates the partnership as to him.”<sup>85</sup>

The members and shareholders, on the other hand, argued that “while fiduciary duties generally terminate when a member of a LLC or a shareholder of a close corporation transfers his interest in the entity, fiduciary duties remain intact with respect to the resolution of pre-separation business.”<sup>86</sup> The members and shareholders relied, in part, on a decision from the Ohio Court of Appeals, which provided that “[t]ermination of the fiduciary relationship does not shield the fiduciary from its duties or obligations concerning transactions which have their inception before the termination of the relationship.”<sup>87</sup>

The court in *Abdalla* stated the issue, which it recognized as one of first impression in Indiana, as follows: “[W]hether a company owes a continuing fiduciary duty to a former shareholder or member to fairly and accurately report the company’s financial results to the IRS for a year in which the former shareholder held stock in the corporation or was a member of the LLC.”<sup>88</sup>

The court agreed with the former shareholders and members, concluding that the corporation and LLCs “owed a fiduciary [duty] to [them] regarding the preparation of tax returns for the period during which [they] were members of the

---

80. *Id.*

81. 913 N.E.2d 280 (Ind. Ct. App. 2009), *trans. denied*, No. 49A04-0812-CV-707, 2010 Ind. LEXIS 60 (Jan. 14, 2010).

82. *Id.* at 286.

83. *Id.* at 284.

84. *Id.*

85. *Id.* at 285-86 (quoting *Bane v. Ferguson*, 890 F.2d 11, 13 (7th Cir. 1989)).

86. *Id.* at 284.

87. *Id.* at 286 (quoting *Thompson v. Cent. Ohio Cellular, Inc., f.k.a., Cellwave Inc.*, 639 N.E.2d 462, 470 (Ohio Ct. App. 1994)).

88. *Id.* at 285.

LLCs and shareholders of [the corporation].”<sup>89</sup> The court explained that although the returns were prepared after termination of the relationship, they were “nevertheless based on transactions that occurred before the termination of the parties’ fiduciary relationship.”<sup>90</sup> To hold otherwise, the court explained, would give the companies “the freedom to allocate tax burdens to [the former shareholders and members] and retain tax benefits for themselves without allowing [the former shareholders and members] any recourse to verify or rectify this allocation.”<sup>91</sup>

#### IV. PARTNERSHIPS

##### *A. Existence and Scope of Partnership*

In *Gates v. Houston*,<sup>92</sup> the Indiana Court of Appeals described the statutory and common law considerations for determining the existence and scope of a partnership. The court concluded that one of the partners individually owned certain properties—i.e., that the properties were not owned by the partnership, despite the partnership’s (and the other partner’s) involvement in the repair and maintenance of the properties and the “split[ting]” of rents as compensation for that involvement.<sup>93</sup> Specifically, the defendant-partner “purchased various properties, many from tax sales.”<sup>94</sup> The properties were purchased in the partner’s name, individually, or in the name of his company.<sup>95</sup> The partnership “did a great deal of the repair work on the properties, for which it was compensated.”<sup>96</sup> Further, the plaintiff-partner “individually worked on the properties and collected rents.”<sup>97</sup> The defendant paid the plaintiff “by dividing equally with him the profits from rents generated by the properties.”<sup>98</sup> A dispute arose regarding the plaintiff’s accounting of rent due, after which the plaintiff filed a complaint, requesting a declaratory judgment declaring him to be co-owner of the properties.<sup>99</sup> The trial court entered judgment in favor of the defendant, and the plaintiff appealed.<sup>100</sup>

---

89. *Id.* at 286.

90. *Id.*

91. *Id.* The court also held that to verify information provided in the tax returns, the former shareholders and members had a right to inspect corporate records relating to the pre-termination period. *Id.* at 287-88.

92. 897 N.E.2d 532 (Ind. Ct. App. 2008).

93. *Id.* at 535-37.

94. *Id.* at 534. “The parties dispute[d] the source of the funds used to purchase these properties.” *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*



The court of appeals first looked to Indiana Code section 23-4-1-6, which defines a partnership as “an association of two (2) or more persons to carry on as co-owners a business for profit.”<sup>101</sup> Further, “Indiana Code section 23-4-1-7 (2006) lists rules for determining whether a partnership exists, including” the following:

The receipt by a person of a share of the profits of a business is prima facie evidence that the person is a partner in the business, but no such inference shall be drawn if such profits were received in payment for the following: . . . (b) *As wages of an employee or rent to a landlord.*<sup>102</sup>

“To form a partnership, parties must join together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits.”<sup>103</sup> Further, the relationship must include: “(1) [A] voluntary contract of association for the purpose of sharing profits and losses, which may arise from the use of capital, labor, or skill in a common enterprise; and (2) an intention on the part of the parties to form a partnership.”<sup>104</sup>

The court in *Gates* held that the defendant-partner individually owned the properties.<sup>105</sup> The court reasoned that the defendant (according to his trial testimony) “acquired the properties of his own accord, with his own funds and credit, and that [the plaintiff] was not a party to [the] purchases or liable for their debt.”<sup>106</sup> Further, the court considered that the defendant contributed money and credit to the partnership during the time that the partnership expended its own resources on the properties, which the court “presum[ed]” was as payment for the partnership’s work on the properties.<sup>107</sup> Regarding the sharing of profits through the division of rent generated by the properties, the court found that such sharing “was in payment for [the plaintiff’s] work in overseeing the properties and collecting the rents.”<sup>108</sup> Finally, the court concluded that the plaintiff’s contribution of labor and other work toward the properties did not constitute a “forfeiture,” again, because the plaintiff (and the partnership) received “compensation” from the defendant for such work.<sup>109</sup>

### *B. Fraudulent Solicitation of Partnership “Investment”*

In *Ruse v. Bleeke*,<sup>110</sup> the court of appeals affirmed the trial court’s findings

---

101. *Id.* at 535 (quoting IND. CODE § 23-4-1-6 (1999)).

102. *Id.* (quoting IND. CODE § 23-4-1-7 (1999)) (emphasis in original).

103. *Id.* (citing *Copenhaver v. Lister*, 852 N.E.2d 50, 58 (Ind. Ct. App. 2006)).

104. *Id.*

105. *Id.* at 536.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. 914 N.E.2d 1 (Ind. Ct. App. 2009).

that a partner committed conversion, theft by deception, fraud and breach of fiduciary duty in connection with the solicitation of the other partner's initial "investment" and subsequent contribution of capital, awarding damages under Indiana's Crime Victim's Relief Act, among other theories.<sup>111</sup> The defendant, Ruse, owned a bar called Pepperchinis, and had inquired about purchasing "Roaring Lion," an energy drink, to be sold at the bar.<sup>112</sup> Ruse informed the plaintiff, Bleeke, that he was considering becoming an Indiana distributor of Roaring Lion and asked whether Bleeke would be interested in becoming a sales representative.<sup>113</sup> After Bleeke indicated he was interested in a percentage of the distribution business, Ruse represented to Bleeke that he had paid \$50,000 for the exclusive distribution rights, and that he would sell a fifty percent interest to Bleeke for \$25,000.<sup>114</sup> Ruse and Bleeke also agreed to each contribute an additional \$6000 to the partnership.<sup>115</sup> In reliance on Ruse's representations, Bleeke paid Ruse \$31,000.<sup>116</sup> Subsequently, Bleeke discovered that Ruse had paid only \$7150 for exclusive rights, accounts and product, and he contributed only \$200—not \$6000—to the partnership's account.<sup>117</sup> Bleeke also discovered various instances of Ruse's unauthorized use of partnership funds.<sup>118</sup> After the parties decided to "wind up" the partnership and Ruse negotiated a purchase of his interest by a third party, Bleeke filed suit against Ruse, alleging claims under the Crime Victim's Relief Act, fraud, and breach of fiduciary duty.<sup>119</sup> The trial court entered judgment for Bleeke, and Ruse appealed.<sup>120</sup>

The court of appeals explained that to prove theft by deception or conversion of partnership assets, Bleeke was required to prove "that Ruse exerted unauthorized control over his property."<sup>121</sup> A person exerts "unauthorized" control over property of another if control "is exerted without the other person's consent or by creating or confirming a false impression in the other person."<sup>122</sup> Further, "to prove theft by creating a false impression, Bleeke was required to establish that he relied upon the false impression."<sup>123</sup> Reliance need not be "reasonable."<sup>124</sup> "The test is whether the representation deceived the person to whom made, not whether it would have deceived a person of ordinary

---

111. *Id.* at 9-10 (quoting and discussing IND. CODE §§ 34-24-3-1 (2008) and IND. CODE § 35-43-4-3 (2008)).

112. *Id.* at 5.

113. *Id.*

114. *Id.*

115. *Id.* at 6.

116. *Id.*

117. *Id.* at 6-7.

118. *Id.*

119. *Id.* at 7.

120. *Id.*

121. *Id.* at 8 (citing IND. CODE § 35-43-4-3 (2008)).

122. *Id.* (citing IND. CODE § 35-43-4-1(1) and (4) (2009)).

123. *Id.* at 9 (citing *Dunnuck v. State*, 644 N.E.2d 1275, 1278 (Ind. Ct. App. 1994)).

124. *Id.* (citing *Snelling v. State*, 326 N.E.2d 606, 609 (Ind. Ct. App. 1975)).



prudence.”<sup>125</sup> Finally, the court noted that “representations creating the false impression must be of a past or existing fact.”<sup>126</sup>

Ruse argued on appeal that Bleeke was estopped from claiming statutory damages under the Crime Victims’ Act, because he “failed to perform any due diligence or inquire into the true status of the business into which he was buying.”<sup>127</sup> The court disagreed, explaining that “it is no defense [under the Indiana Crime Victims’ Act] that the victim should have known better.”<sup>128</sup>

Ruse also argued that the trial court’s entry of judgment for common law fraud and breach of fiduciary duty, in the amount of the full \$31,000 paid by Bleeke, was erroneous, because his representation that he would contribute \$6000 for working capital was “at best . . . a misrepresentation of future conduct.”<sup>129</sup> The court stated “[a]ctual fraud may not be based upon representations of future conduct, broken promises, or representations of existing intent that are not executed.”<sup>130</sup> But the court of appeals, deferring to the trial court, disagreed, explaining that Ruse’s misrepresentation regarding the amount of his initial investment was “enough . . . to support the trial court’s legal conclusion that Ruse committed fraud.”<sup>131</sup> The court concluded, then, that Bleeke’s payment of \$31,000 to Ruse was made in reliance on that misrepresentation.<sup>132</sup>

Finally, the court addressed the breach of fiduciary duty claim, explaining the fiduciary relationship among partners as follows:

Partners owe a fiduciary duty to one another that continues until final termination of the business of the partnership. The fiduciary relationship between partners requires each partner to exercise good faith and fair dealing in partnership transactions and toward co-partners. The fiduciary relationship between partners prohibits a partner from taking any personal advantage touching the business aspects or property rights of the partnership.<sup>133</sup>

The court of appeals affirmed the trial court’s conclusion that Ruse breached the fiduciary duties owed to his partner, Bleeke, by failing to make his \$6000 contribution for working capital, and by using “the partnership checking account for his own purposes.”<sup>134</sup>

---

125. *Id.* (quoting *Harwei, Inc. v. State*, 459 N.E.2d 52, 57 n.7 (Ind. Ct. App. 1984)).

126. *Id.* (citing *Dunnuck*, 644 N.E.2d at 1278).

127. *Id.*

128. *Id.* (quoting *Harwei*, 459 N.E.2d at 57 n.7).

129. *Id.* at 10.

130. *Id.* (citing *Bilimoria Computer Sys., LLC v. Am. Online, Inc.*, 829 N.E.2d 150, 155 (Ind. Ct. App. 2005)).

131. *Id.* at 11.

132. *Id.*

133. *Id.* (internal citations omitted).

134. *Id.*

## V. JOINT VENTURES

In *DLZ Indiana, LLC v. Greene County*,<sup>135</sup> the court of appeals analyzed the standards for determining whether a “joint venture” exists, focusing on the “sharing of profits” and “mutual control” factors, and concluded that no joint venture was created in this particular case.<sup>136</sup> In 2001, the County entered into a contract “with [United Consulting Engineers, Inc. (“United”)] and DLZ to design the expansion and renovation of the Greene County Courthouse.”<sup>137</sup> The contract provided that United and DLZ would work “jointly and in collaboration.”<sup>138</sup> DLZ and United also entered into a subcontract, which provided that DLZ was an independent contract and United would pay an hourly rate.<sup>139</sup> Before work was completed, the County filed suit against DLZ and United for breach of contract, breach of warranty, and negligence.<sup>140</sup> The complaint was later amended, alleging that DLZ and United are jointly liable “as a Joint Venture.”<sup>141</sup> The trial court granted partial summary judgment in favor of the County on the joint venture issue, and DLZ appealed.<sup>142</sup>

The court outlined the law applying to the existence of a “joint venture” as follows:

A joint venture has been defined as an association of two or more persons formed to carry out a single business enterprise for profit. . . . For a joint venture to exist, the parties must be bound by an express or implied contract providing for (1) a community of interests, and (2) *joint or mutual control, that is, an equal right to direct and govern the undertaking, that binds the parties to such an agreement.* . . . A joint venture is similar to a partnership except that a joint venture contemplates only a single transaction. . . . *A joint venture agreement must also provide for the sharing of profits.*<sup>143</sup>

The court also described the “contractual” nature of a joint venture:

A joint venture will arise only from an express or implied contract. . . . That relationship might be expressly defined in a contract or it might be implied from the conduct of the parties, but a joint venture will not arise by operation of law. . . . Nor, notably, does merely calling a relationship a “joint venture” mean that a joint venture exists.<sup>144</sup>

---

135. 902 N.E.2d 323 (Ind. Ct. App. 2009).

136. *Id.* at 331-32.

137. *Id.* at 325.

138. *Id.*

139. *Id.* at 326.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 328 (quoting *Walker v. Martin*, 887 N.E.2d 125, 138 (Ind. Ct. App. 2008) (internal citations omitted)).

144. *Id.* (internal citations omitted).



On the issue of “mutual control,” the court found that the contract documents did not support a finding that a joint venture existed.<sup>145</sup> Specifically, the subcontract between DLZ and United designated United as “the principal” over the project, while “DLZ assumed responsibility and liability only for the services it provided to the County.”<sup>146</sup> According to the court, “the provisions . . . allocating responsibility and liability between United and DLZ, and limiting DLZ’s responsibility and liability, are incompatible with a joint venture.”<sup>147</sup>

On the issue of “sharing of profits,” the court described the required analysis as follows:

In the context of a joint venture, before profit can be attributed to the joint venture, there must first be a community of interests or joint proprietary interest in the undertaking. An agreement to share the risk and the reward of the enterprise is an essential ingredient and condition precedent to shared profits. In a joint venture, profit means a net financial gain or return for the joint venture, not merely for the parties individually.<sup>148</sup>

The court found United paid DLZ an hourly rate for its services.<sup>149</sup> According to the court, “[t]he payment of professional fees to DLZ for services rendered at a predetermined contract rate is not a distribution of profit.”<sup>150</sup> The court concluded that a “joint venture” was not formed, and it reversed the trial court’s entry of summary judgment in favor of the County, with instructions to enter partial summary judgment in favor of DLZ on the issue.<sup>151</sup>

## VI. TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP

In *Columbus Medical Services Organization, LLC v. Liberty Healthcare Corp.*,<sup>152</sup> the Indiana Court of Appeals evaluated proof of lost profits damages and causation as elements of a claim of tortious interference with a business relationship, including recovery of damages under Indiana’s Crime Victims Relief Act by a “third-party” to the “crime.” Specifically, Liberty Healthcare Corporation (“Liberty”) and Columbus Medical Services Organization, LLC (“Columbus”), “competing medical recruiting and staffing companies,” were among four bidders in response to a request for proposal (RFP) published by the Indiana Department of Administration (IDOA).<sup>153</sup> The bids were “for the

---

145. *Id.* at 330.

146. *Id.* at 329.

147. *Id.* at 330.

148. *Id.* at 331.

149. *Id.*

150. *Id.* (citing *Walker v. Martin*, 887 N.E.2d 125, 138 (Ind. Ct. App. 2008); *Inland Steel v. Pequignet*, 608 N.E.2d 1378, 1382 (Ind. Ct. App. 1993)).

151. *Id.* at 332.

152. 911 N.E.2d 85 (Ind. Ct. App. 2009).

153. *Id.* at 88. IDOA published the RFP on behalf of the Family and Social Services

provision of psychiatric medical staffing services at the Logansport State Hospital.”<sup>154</sup>

Two other vendors, in addition to Liberty and Columbus, “submitted bids in response to the RFP.”<sup>155</sup> Liberty quoted a price of \$3,219,612, and Columbus quoted a price of \$2,816,144.<sup>156</sup> Columbus’s proposal included an appendix that concluded the curriculum vitae of candidates for employment, including Dr. Roger Jay Pentzien.<sup>157</sup> This, however, was inaccurate as “Columbus had not had contact with *any* of the physicians listed in its proposal.”<sup>158</sup> Based on the initial proposals, the IDOA requested that Liberty, Columbus, and another bidder provide a “Best and Final Offer” (BAFO) in price.<sup>159</sup> In response, Liberty lowered its price to \$3,098,004.<sup>160</sup> Columbus accepted certain other terms requested by the IDOA but declined to lower its price.<sup>161</sup> After evaluating the BAFO responses, the IDO sent Columbus and Liberty a second BAFO request, indicating that “the final decision . . . will be based on the lowest cost to provide all services requested.”<sup>162</sup> This prompted both Liberty and Columbus to lower their prices. The state selected Columbus to begin contract negotiations.<sup>163</sup>

Soon after the state selected Columbus, Liberty learned of Columbus’s misrepresentation regarding its “discussion” with Dr. Pentzien, the “services” he would be providing the Hospital, “and that Dr. Pentzien had shown an interest in providing services . . . if Columbus was selected as the successful bidder.”<sup>164</sup> Dr. Pentzien was “outraged” and “wrote a letter . . . to the IDOA complaining about Columbus’s actions.”<sup>165</sup> After reviewing the materials, the IDOA’s staff counsel “determined that Columbus’s proposal should never have been scored at all by the evaluation team.”<sup>166</sup> Liberty was later selected to enter into contract negotiations, but was apparently “stuck” at its second BAFO contract price.<sup>167</sup> Liberty and the State ultimately executed a contract at the second BAFO contract price, and “[t]he State paid Liberty \$4.5 million over the life of the two-year contract.”<sup>168</sup>

Liberty sued Columbus, alleging tortious interference with its “business

---

Administration’s Division of Mental Health and Addiction. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 89.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 89-90 (internal quotations omitted).

165. *Id.* at 90.

166. *Id.*

167. *Id.*

168. *Id.* at 91.



relationship with the State by knowingly and intentionally including false information in its proposal . . . to gain an unfair business advantage over Liberty and other responsive bidders.”<sup>169</sup> Liberty also “alleged that but for these false representations, the State would not have solicited two rounds of BAFOs and Liberty would have been awarded the contract based on its initial proposal rather than the lowered price in its Second BAFO.”<sup>170</sup> Liberty further “sought treble damages and attorney’s fees and costs under the Crime Victims Relief Act, alleging that Columbus’s conduct constituted government contract procurement through false information.”<sup>171</sup> After a four-day bench trial, the trial court ruled in favor of Liberty on its tortious interference claim, for \$486,497, the difference between the revenue Liberty received and the revenue it would have received under the first BAFO.<sup>172</sup> The trial court also awarded fees and costs for \$473,468.04, under the Crime Victims Relief Act.<sup>173</sup> Columbus appealed, arguing “that: (1) the trial court erroneously speculated in calculating Liberty’s damages; (2) there is no causal connection between Columbus’s actions and the damages suffered by Liberty; and (3) the court erred in applying the Crime Victims Relief Act.”<sup>174</sup>

The court noted that “[t]he elements of tortious interference with a business relationship are” as follows:

1. the existence of a valid business relationship;
2. the defendants’ knowledge of the existence of the relationship;
3. the defendant’s intentional interference with that relationship;
4. the absence of justification; and
5. damages resulting from the defendant’s wrongful interference with the relationship.<sup>175</sup>

Further, the court noted that the Indiana Supreme Court “has held that ‘this tort requires some independent illegal action.’”<sup>176</sup>

The court in *Liberty* rejected Columbus’s argument that the trial court’s damages award was based on “pure speculation,” concluding that the “damage[s] award to Liberty [was] within the scope of the evidence that was before the court.”<sup>177</sup> The court explained that the law regarding recovery of tort damages,

---

169. *Id.*

170. *Id.*

171. *Id.* (citing IND. CODE § 35-43-5-11 (2009)).

172. *Id.* at 91-92.

173. *Id.* at 94-95.

174. *Id.* at 95. Columbus did not challenge on appeal “the existence of a valid business relationship[,] even in the absence of a written contract,” as well as its awareness of the relationship, its interference with the relationship, and the absence of justification. *Id.* at 95 n.7.

175. *Id.* at 94-95 (citing *AutoXchange.com, Inc. v. Dreyer and Reinbold, Inc.*, 816 N.E.2d 40, 51 (Ind. Ct. App. 2004)).

176. *Id.* at 95 (quoting *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*, 796 N.E.2d 286, 291 (Ind. 2003)).

177. *Id.*

including on a tortious interference claim, as follows:

It is well-established that, “in tort, all damages directly traceable to the wrong and arising without an intervening agency are recoverable.” Also, when “[i]t [is] the tortious act of [an] appellant which created this situation[,] . . . all doubts and uncertainties as to the proof of the exact measure of damages must be resolved against it . . . . The most elementary conception of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong created.”<sup>178</sup>

Under Indiana law, the court continued, lost profits as a measure of damages need not “be ascertainable with absolute certainty.”<sup>179</sup> Rather, courts “look to the ‘fair and reasonable’ inferences [that can be derived] from the evidence”:

[L]ess certainty is required to prove amount of loss than is required to prove the fact that profits were in truth lost. Evidence of profits is not open to the objection of uncertainty where there is testimony which, while not sufficient to put the amount beyond doubt, is sufficient to enable the [factfinder] to make a fair and reasonable finding with respect thereto.<sup>180</sup>

In the present case, the court reasoned that “it cannot be seriously questioned that Columbus’s intentional, fraudulent participation affected the dynamics of the RFP process by enabling the State to bargain with what it thought were two responsible and responsive bidders.”<sup>181</sup> The court found that “as a direct result of Columbus’s tortious participation in the RFP process, Liberty reduced its contract proposal to the State, which bound Liberty in subsequent negotiations.”<sup>182</sup>

Like the trial court,<sup>183</sup> the court of appeals apparently accepted the “assum[ption]” that the State would have accepted either Liberty’s first proposed contract or its First BAFO: “While we cannot say with certainty what, if any, final contract price Liberty would have obtained without Columbus’s tortious interference, the evidence strongly suggests that the State would not have been entertaining competitive bids and that Liberty would have been bidding against itself and not against Columbus.”<sup>184</sup> According to the court, “Columbus should not be allowed to escape liability for Liberty’s lost profits merely because the

---

178. *Id.* at 96 (internal citations omitted).

179. *Id.*

180. *Id.* (quoting *Jerry Alderman Ford Sales, Inc. v. Bailey*, 291 N.E.2d 92, 106 (Ind. Ct. App. 1972)).

181. *Id.*

182. *Id.* at 96-97.

183. *Id.* at 95 (explaining that the trial court, in evaluating various damages calculation alternatives, “assumed the State would have accepted either Liberty’s first proposed contract or Liberty’s First BAFO”).

184. *Id.* at 97.



complexities of the RFP process preclude the calculation of damages with mathematical certainty.”<sup>185</sup>

The court also rejected Columbus’s arguments that the ultimate negotiation of changes to certain contract terms (which were arguably more favorable to Liberty) “interrupt[ed] any causal connection between Columbus[’s] actions and” Liberty’s allowed damages.<sup>186</sup> Finally, the court upheld the trial court’s finding that Liberty was entitled to recovery under the Crime Victims Relief Act, based on Columbus’s provision of “false information to a governmental entity to obtain a contract from the governmental entity.”<sup>187</sup> The court held that Liberty was entitled to recover the enhanced statutory damages, even though it was not the governmental entity to which false information was provided, because it suffered pecuniary loss because of Columbus’s “crime.”<sup>188</sup>

## VII. NON-COMPETITION COVENANTS

In *Mercho-Roushdi-Shoemaker-Dilley Thoraco-Vascular Corp. v. Blatchford*,<sup>189</sup> the Indiana Court of Appeals held that non-competition clauses signed by doctor-employees were unenforceable.<sup>190</sup> Defendant MRSD was a physicians group performing cardiovascular services in Indianapolis and Terre Haute.<sup>191</sup> Plaintiff Doctors Blatchford and Cieutat (“plaintiffs”) were married and former shareholders and employees of MRSD.<sup>192</sup> The stock purchase agreement entered between plaintiffs and the physician group contained a non-competition clause which prevented plaintiffs from practicing within fifty miles of the center of both Indianapolis and Terre Haute for three years after plaintiffs cease to be shareholders in MRSD.<sup>193</sup> The plaintiffs’ employment agreements with MRSD also contained non-competition clauses prohibiting practicing within fifty miles of the center of Indianapolis, Terre Haute, and Vincennes (if MRSD opened a medical practice in Vincennes) for three years after the termination of doctors’ employment.<sup>194</sup> Plaintiffs subsequently left employment (voluntarily and involuntarily) with MRSD and began practicing in Terre Haute.<sup>195</sup>

Plaintiffs filed a nine-count complaint against MRSD and its individual owner-directors.<sup>196</sup> Plaintiffs alleged various counts of waste and dereliction of

---

185. *Id.*

186. *Id.* at 97-98 (internal quotations omitted).

187. *Id.* at 98 (quoting IND. CODE § 35-43-5-11 (Supp. 2009)).

188. *Id.* at 98-99.

189. 900 N.E.2d 786 (Ind. Ct. App.), *trans. denied*, 918 N.E.2d 604 (Ind. 2009).

190. *Id.* at 800-01.

191. *Id.* at 789 (citing *Mercho-Rooshdi-Shoemaker-Dilley Thoraco-Vascular Corp. v. Blatchford* (*Blatchford I*), 742 N.E.2d 519, 521-23 (Ind. Ct. App. 2001)).

192. *Id.* at 790 (citing *Blatchford I*, 742 N.E.2d at 521-23).

193. *Id.* at 790-91 (citing *Blatchford I*, 742 N.E.2d at 521-23).

194. *Id.* at 791 (citing *Blatchford I*, 742 N.E.2d at 521-23).

195. *Id.* at 791-92 (citing *Blatchford I*, 742 N.E.2d at 521-23).

196. *Id.* at 792.

duty against the other directors, wrongful termination, breach of fiduciary duty, and breach of contract, and sought declaratory judgments that the non-compete clauses in both the stock purchase agreements and employment agreements were unenforceable.<sup>197</sup> Among other claims, MRSD asserted a counterclaim for a preliminary injunction prohibiting doctors from competing with MRSD.<sup>198</sup> The trial court denied MRSD's motion for preliminary injunction on grounds that the non-compete clauses were unenforceable, which was affirmed on interlocutory appeal.<sup>199</sup> On remand, the parties cross-moved for summary judgment.<sup>200</sup> The trial court granted summary judgment for MRSD on plaintiffs' claims for waste, wrongful termination, breach of fiduciary duty, and breach of contract.<sup>201</sup> The trial court granted summary judgment for the doctors on their claims for declaratory judgment, finding the non-competition clauses unenforceable.<sup>202</sup> Both parties appealed.<sup>203</sup>

MRSD argued on appeal that the trial court incorrectly determined on summary judgment that the non-competition clauses were unenforceable.<sup>204</sup> The court began its analysis of the noncompetition clauses by noting that "there are two competing policies at play: freedom of contract and freedom of trade."<sup>205</sup> The court noted that because noncompetition agreements involving physicians implicate interest beyond those of the employer and employee, such as interests of the patient, such agreements "should be given particularly careful scrutiny."<sup>206</sup> The reasonableness of a noncompetition agreement, which is a matter of law, turns on "three factors: (1) whether the agreement is wider than necessary for the protection of the employer in some legitimate interest (2) the effect of the agreement upon the employee; and (3) the effect of the agreement upon the public."<sup>207</sup>

The court found that the first element, the scope of the agreement, favored MRSD.<sup>208</sup> MRSD had a legitimate interest in the "effort, money and time" spent by MRSD to establish the Terre Haute practice before bringing in the plaintiffs.<sup>209</sup> The court found that the three-year and fifty-mile restrictions were reasonable in scope based largely on the plaintiffs' "fleeting argument, lacking

---

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 793.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 795.

205. *Id.*

206. *Id.* at 795-96 (quoting *Cent. Ind. Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 729 (Ind. 2008)).

207. *Id.* at 796 (citing *Med. Specialists, Inc. v. Sleweon*, 652 N.E.2d 517, 522 (Ind. Ct. App. 1995)).

208. *Id.* at 796-97.

209. *Id.* at 796 (internal quotations omitted).



citation to authority or the record, that the agreements are wider than necessary in terms of time and geography.”<sup>210</sup>

The court found that the second element, effect on the employee, did not make the noncompetition clauses unreasonable, again because plaintiffs made a “passing argument” without citation to the record or authority.<sup>211</sup>

The court found that the third element, effect of the agreement on the public, favored the plaintiffs and, as a result, the noncompetition clauses were unenforceable.<sup>212</sup> Plaintiffs presented testimony of “seven Terre Haute doctors who believe that enforcement of the non-competition agreements would have tended to injure the Terre Haute community” because, among other things, the plaintiffs had unique skills in Terre Haute, the plaintiffs were the best-trained cardiovascular surgeons in the Terre Haute area, and without the plaintiffs able to practice many patients would be transferred to Indianapolis.<sup>213</sup> MRSD failed to designate any conflicting evidence.<sup>214</sup> Based on MRSD’s failure to designate evidence to contradict the plaintiffs’ showing “that enforcement of the non-compete clauses would have been contrary to public policy,” the court affirmed the trial court.<sup>215</sup>

In *Coffman v. Olson & Co.*,<sup>216</sup> the court held that a noncompetition provision in an accountant’s employment contract was enforceable,<sup>217</sup> but a liquidated damages provision in that contract was an unenforceable penalty.<sup>218</sup> Coffman is a certified public accountant formerly employed by Olson.<sup>219</sup> In every year of employment with Olson, Coffman signed an Agreement containing a provision barring competition for Olson’s clients for a period of two years in Lawrence County and Monroe County.<sup>220</sup> The Agreement further did not allow Coffman to “divert or take away or attempt to divert or take away . . . [or] call upon or

---

210. *Id.*

211. *Id.* at 797.

212. *Id.* at 797-99.

213. *Id.*

214. *Id.* at 799.

215. *Id.* On the plaintiffs’ cross-appeal, the court held that the plaintiffs failed to show damages on their breach of fiduciary duty claim and affirmed summary judgment for the other shareholders. *Id.* at 800. Plaintiffs contended that the other shareholders in MRSD, characterized without objection as a close corporation, owed them fiduciary duties. *Id.* Plaintiffs alleged that the other shareholders breached their duty “by forming an unauthorized ‘executive committee’ and voting to terminate” plaintiff Dr. Blatchford’s employment without participation by Drs. Blatchford and Cieutat. *Id.* Plaintiffs discussed their damages at length, but “fail[ed] to attach any specific damages to any specific claim,” i.e., they did not demonstrate how the activities of the “executive committee” caused the alleged damages. *Id.*

216. 906 N.E.2d 201 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 555 (Ind. 2009).

217. *Id.* at 208.

218. *Id.* at 210.

219. *Id.* at 204.

220. *Id.*

solicit or attempt to call upon or solicit any” Olson customers.<sup>221</sup> The Agreement also contained a liquidated damages clause for performing accounting services to any Olson client, setting damages at “two (2) times that client’s most recent twelve months billings,” and increasing damages to three times the most recent twelve months billings if Coffman failed to notify and pay Olson the damages within the specified period.<sup>222</sup> Coffman eventually left Olson and formed his own firm.<sup>223</sup> Coffman serviced seventeen Olson clients, although the clients independently contacted Coffman.<sup>224</sup> A bench trial was held, and the trial court found that the noncompetition provision in the Agreement was enforceable.<sup>225</sup> But the trial court found that the liquidated damages provision was an unenforceable penalty and awarded damages for the actual fees received from the Olson clients in question in the previous twelve months.<sup>226</sup> Both parties appealed.<sup>227</sup>

Coffman argued on appeal that the noncompetition provision in the Agreement was unenforceable because Olson lacked “a protectable interest under the Agreement.”<sup>228</sup> The court stated the standard to be applied to noncompetition provisions:

Noncompetition agreements are strictly construed against the employer and are enforced only if reasonable. Covenants must be reasonable with respect to the legitimate interests of the employer, restrictions on the employee, and the public interest. To determine the reasonableness of the covenant, we first consider whether the employer has asserted a legitimate interest that may be protected by a covenant. If the employer has asserted such an interest, we then determine whether the scope of the agreement is reasonable in terms of time, geography, and types of activity prohibited. The employer bears the burden of showing that the covenant is reasonable and necessary in light of the circumstances. In other words, the employer must demonstrate that the former employee has gained a unique competitive advantage or ability to harm the employer before such employer is entitled to the protection of a noncompetition covenant.<sup>229</sup>

The court recognized that Olson had a legitimate “protectable interest in the goodwill generated” with its customers, and that Coffman had gained a

---

221. *Id.*

222. *Id.* at 204-05.

223. *Id.* at 205.

224. *Id.*

225. *Id.* at 205-06.

226. *Id.* at 206.

227. *Id.* at 203.

228. *Id.* at 207.

229. *Id.* (quoting *Pathfinder Commc’ns Corp. v. Macy*, 795 N.E.2d 1103, 1109 (Ind. Ct. App. 2003)).



competitive advantage through “representative contact” with Olson clients.<sup>230</sup> Coffman also argued that the Olson clients had already terminated their relationships—the clients only knew about Coffman through the business relationship with Olson.<sup>231</sup> The court rejected Coffman’s argument that the noncompetition clause was void as against public policy because accountants are similar to lawyers, pointing to Indiana Rule of Professional Conduct 5.6, which prohibits noncompetition agreements by lawyers.<sup>232</sup> The court, in rejecting this argument, simply stated that “there is no such ethical rule restricting employees and employers in the accounting profession from entering into noncompetition agreements.”<sup>233</sup> Finally, the court found that the two-year time limit and the geographical limit to Lawrence County and Monroe County were reasonable, noting that *Ebbeskotte v. Tyler*<sup>234</sup> had upheld a noncompetition agreement with an accountant that contained *no* specific geographical or temporal limitations.<sup>235</sup>

After upholding the noncompetition provision, the court determined that the liquidated damages clause was an unenforceable penalty.<sup>236</sup> Olson argued that the liquidated damages clause was reasonable because evidence had been presented that “multiplying annual gross revenue by a factor of two or three” is a reasonable approximation of the value of an accounting practice.<sup>237</sup> The court rejected this argument, finding that the liquidated damages were imposed for the performance of any accounting service, regardless of the actual harm caused by the breach.<sup>238</sup>

Finally, the court stated “[i]n the absence of an enforceable liquidated damages clause, lost profits are an appropriate measure of damages in actions involving noncompetition provisions.”<sup>239</sup> The court further stated “[i]n awarding lost profits, net profits, and not gross profits, are generally the proper measure of recovery.”<sup>240</sup> The court affirmed the trial court’s award of gross revenue from the Olson clients for the one-year period prior to Coffman’s termination, holding that by limiting gross revenue to the prior year the trial court “[i]n a way . . . took into consideration the fact that gross revenue is not equivalent to lost profits” and that the trial court’s damage award was “within the scope of the evidence.”<sup>241</sup>

---

230. *Id.*

231. *Id.* at 208.

232. *Id.* (citing IND. PROF’L COND. R. 5.6).

233. *Id.*

234. 142 N.E.2d 905, 909 (Ind. App. Ct. 1957).

235. *Coffman*, 906 N.E.2d at 208 (citing *Ebbeskotte v. Tyler*, 142 N.E.2d 905, 909 (Ind. Ct. App. 1957)).

236. *Id.* at 208-10.

237. *Id.* at 209.

238. *Id.* at 209-10 (citing *Hahn v. Drees, Perugini & Co.*, 581 N.E.2d 457, 463 (Ind. Ct. App. 1991); *Seach v. Richards, Dieterle & Co.*, 439 N.E.2d 208, 216 (Ind. Ct. App. 1982)).

239. *Id.* at 210 (citing *Turbines, Inc. v. Thompson*, 684 N.E.2d 254, 257 (Ind. Ct. App. 1997); *Hahn*, 581 N.E.2d at 463).

240. *Id.* (citing *Turbines*, 684 N.E.2d at 257).

241. *Id.* at 211.

Judge Crone dissented, disagreeing with the majority on whether Olson had a legitimate protectable interest in the clients who voluntarily followed Coffman.<sup>242</sup> In Judge Crone's view, "once the clients voluntarily ceased doing business with Olson, any goodwill that Olson enjoyed with respect to those clients ceased to exist."<sup>243</sup> Without that goodwill, Judge Crone argued, Olson's protectable interest "also ceased to exist."<sup>244</sup> Additionally, Judge Crone believed without a legitimate protectable interest, Olson could not prove actual damages; Olson could not reasonably expect revenue or continued client relationships after the clients voluntarily left.<sup>245</sup> Judge Crone finished by noting that without actual damages, there would be no basis for liquidated damages.<sup>246</sup>

## VIII. CONTRACT PERFORMANCE AND BREACH

### A. *Certainty of Terms and Specific Performance*

In *Conwell v. Gray Loon Outdoor Marketing Group, Inc.*,<sup>247</sup> the Indiana Supreme Court held that a contract for the design and hosting of a website, governed by the common law of contracts, was sufficiently definite and certain to be enforceable.<sup>248</sup> Piece of America (POA) hired Gray Loon to develop and host a website.<sup>249</sup> Gray Loon delivered the website and POA paid for it without issue.<sup>250</sup> Later, POA requested several changes to the website, "some of which required major programming work."<sup>251</sup> Gray Loon immediately began work on the changes.<sup>252</sup> POA "did not request a proposal or a quote, and Gray Loon did not provide one."<sup>253</sup> After the modifications were completed, Gray Loon sent an invoice to POA, which was not paid.<sup>254</sup> POA's contact person told Gray Loon that POA did not have any issues with the invoice, but that POA needed more time to pay.<sup>255</sup>

Gray Loon sued POA for nonpayment.<sup>256</sup> POA counterclaimed for conversion of the website, which had been taken offline for nonpayment.<sup>257</sup> The

---

242. *Id.* at 211-12 (Crone, J., dissenting).

243. *Id.* at 211.

244. *Id.*

245. *Id.* at 212.

246. *Id.*

247. 906 N.E.2d 805 (Ind. 2009).

248. *Id.* at 813.

249. *Id.* at 808.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* at 808-09.

255. *Id.*

256. *Id.* at 809.

257. *Id.*



trial court entered judgment for Gray Loon and against POA, and the court of appeals affirmed.<sup>258</sup>

On transfer, the Indiana Supreme Court initially determined that the common law of contracts, and not the U.C.C., applied to the agreement in question.<sup>259</sup>

Under common law principles, the court affirmed the trial court's ruling that the contract for changes to the website was enforceable.<sup>260</sup> The court stated "[t]o be valid and enforceable, a contract must be reasonably definite and certain."<sup>261</sup>

The court further noted "All that is required to render a contract enforceable is reasonable certainty in the terms and conditions of the promises made . . . ; absolute certainty in all terms is not required. Only essential terms need to be included to render a contract enforceable."<sup>262</sup> The court determined that the evidence, "such as it is," showed that the parties did not consider the price as an essential term of the contract.<sup>263</sup> POA did not inquire into how much the modifications would cost, and POA's representative accepted the price after receiving the invoice.<sup>264</sup> The court believed "[t]here was no evidence that Gray Loon participated in any unconscionable effort to 'strong-arm' POA into paying an unreasonable fee."<sup>265</sup> Finally, as to specific performance, the court noted that if POA paid the full invoice amount as ordered by the trial court, "POA would be entitled to the website as modified."<sup>266</sup>

### *B. Statute of Limitations on Contract and Related Claims*

In *City of East Chicago v. East Chicago Second Century, Inc.*,<sup>267</sup> the Indiana Supreme Court held that the City of East Chicago stated a claim for breach of an economic development agreement against a for-profit corporation receiving

---

258. *Id.*

259. *Id.* at 811-12 (holding that the "predominate thrust" of the contract was services because the arrangement "contemplated a custom design for a single customer and an ongoing hosting relationship").

260. *Id.* at 812-13.

261. *Id.* at 813 (citing *Wenning v. Calhoun*, 827 N.E.2d 627 (Ind. Ct. App. 2005)).

262. *Id.* (citing *Illiana Surgery & Med. Ctr., LLC v. STG Funding, Inc.*, 824 N.E.2d 388 (Ind. Ct. App. 2005)).

263. *See id.* The court also determined that no written agreement was required because the original contract did not have a written change order requirement. *Id.* The request for changes to the website was treated as a new transaction rather than an expansion in scope of the original agreement. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 813 n.9. The opinion concludes with a discussion of copyright law, determining that POA's counterclaim for conversion failed because Gray Loon remained the owner of the website and POA only had a "nonexclusive license." *Id.* at 814-17. Justice Boehm concurred in result with separate opinion on the conversion issue. *Id.* at 817-19 (Boehm, J., concurring).

267. 908 N.E.2d 611 (Ind. 2009).

riverboat gambling revenue that refused to open its books for inspection.<sup>268</sup> This case is one of several appeals involving the East Chicago riverboat gaming license and various private entities receiving riverboat gaming revenue.<sup>269</sup> The initial applicant for the license, Showboat, entered a local development agreement with the City of East Chicago, which “was memorialized in” a series of letters with the Mayor and ratified by the East Chicago Common Council.<sup>270</sup>

Under the arrangement, Showboat agreed to “contribute annually to and for the benefit of economic development, education and community development in the city” an amount of total contribution equal to 3.75% of its adjusted gross receipts (as defined by Ind. Code § 4-33-2-2) in the event Showboat received a license from the Indiana Gaming Commission and began operating a casino in East Chicago. Of that total contribution, 1% would be allocated directly to the City; 1% to the Twin City Education Foundation, a non-profit corporation; 1% to the East Chicago Community Foundation, another non-profit; and 0.75% to East Chicago Second Century, Inc., a for-profit corporation. The agreement also provided that Second Century would undertake development activities at sites within East Chicago, that all projects pursued by Second Century would conform to the City’s development and master plans, and that all Second Century projects would require approval from the City.<sup>271</sup>

The procedural history of the case is complicated. Following several ownership changes of the East Chicago casino, which each required approval of the Indiana Gaming Commission, Second Century filed a declaratory judgment action seeking to establish that the new licensee would be required to continue making payments to Second Century.<sup>272</sup> Indiana’s Attorney General intervened, seeking to impose a public trust “and an accounting for the money paid to Second Century.”<sup>273</sup> Concerning Second Century’s declaratory judgment action, the new licensee answered, counterclaimed, and filed a third-party complaint against the two non-profit Foundations and the City of East Chicago, seeking a declaration of which entities should continue to receive the gambling revenues.<sup>274</sup> The Foundations answered and asserted an intervening complaint, and the City answered, counterclaimed, and filed a third-party complaint.<sup>275</sup> The Foundations and Second Century “moved to dismiss the City’s claims, and the City moved for

---

268. *Id.* at 615.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 615-16.

273. *Id.* at 616. The ensuing appeal relating to the Attorney General’s claims is discussed in *infra* Part VIII.C.

274. *Id.*

275. *Id.*



partial summary judgment.”<sup>276</sup> The trial court dismissed all of the City’s claims on statute of limitations grounds except its breach of contract claim against Second Century.<sup>277</sup> The trial court “denied the City’s motion for summary judgment.”<sup>278</sup> The court of appeals affirmed in part and reversed in part, and the supreme court granted transfer.<sup>279</sup>

Second Century argued that the trial court erred by failing to dismiss the City’s breach of contract count.<sup>280</sup> The court determined that the City stated a claim for breach of the economic development agreement or its related agreements.<sup>281</sup> The City asserted that Second Century and its principals breached the agreement “by failing to open its books and records to the City in order to permit the City to exercise the agreed upon oversight.”<sup>282</sup> The related Confirmation Agreement allocated to the City “the sole responsibility for assuring that Second Century will perform the duties described in the development agreement.”<sup>283</sup> The court affirmed the trial court, stating “[i]t is difficult to see how the City could adequately determine whether Second Century was using the funds entrusted to it under the letter agreement without viewing Second Century’s financial records.”<sup>284</sup>

### C. Attorney General Oversight of For-Profit Corporations

In *Zoeller v. East Chicago Second Century, Inc.*,<sup>285</sup> the court held that the Attorney General had authority to oversee a private, non-profit corporation based on its receipt of funds intended for public benefit.<sup>286</sup> This case involved the East Chicago riverboat gaming license and associated local development agreement,

---

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 617.

280. *Id.* at 622.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.* Regarding the City’s motion for summary judgment, the court held that the economic development agreement was not “terminable at will” but was rather “subject to periodic alteration (through the administrative processes of the [Indiana] Gaming Commission).” *Id.* at 623-24. Therefore, the City was not entitled to redirect funds from Second Century and the Foundations to the City. *Id.* Additionally, the court appeared to reject in part the RESTATEMENT (SECOND) OF CONTRACTS § 311 (1979), instead adopting the principal that a third party beneficiary acting in reliance on a contract should only be protected to the extent of the reliance. *Id.* at 624-25. The Foundations may have been third-party beneficiaries of the economic development agreement based on their justifiable reliance on gambling revenue, “that reliance should not be a permanent bar to altering the methods employed to further economic development in East Chicago.” *Id.* at 625. Again, the Indiana Gaming Commission could revise the economic development agreement. *Id.*

285. 904 N.E.2d 213 (Ind. 2009).

286. *Id.* at 218-20.

which are discussed in more detail in Part VIII.B. In this portion of the case, the Indiana Attorney General intervened, seeking to impose a constructive trust and an accounting over the riverboat money paid to Second Century and its principals.<sup>287</sup> The trial court dismissed the Attorney General's claims, the court of appeals affirmed, and the supreme court granted transfer.<sup>288</sup>

The court held that the Attorney General had authority to bring its action against Second Century, a private, for-profit corporation, under the Attorney General's "broad common law and statutory authority . . . to protect the public interest in charitable and benevolent instrumentalities."<sup>289</sup> Second Century argued that the Attorney General's claim should be dismissed on grounds that, as a for-profit corporation, Second Century was outside the scope of the provisions of the trust code authorizing Attorney General supervision of charitable activity.<sup>290</sup> The Attorney General argued that the riverboat funds "were intended to benefit the public of East Chicago" through local economic development.<sup>291</sup>

The court noted the long-held common law view that the Attorney General had authority to enforce "[t]he people's interest in the rectitude of entities created in the name of public good, such as charities."<sup>292</sup> Indiana's trust code "did not abrogate the common law view of the Attorney General's authority, 'but rather codified it.'"<sup>293</sup> The trust code itself indicates that the courts should "liberally" treat "entities as falling under the protections of the trust code."<sup>294</sup> The trust code "covers multiple entities other than public charitable trusts," including trusts for "benevolent public purpose[s]."<sup>295</sup> Under this "broad common law and statutory authority," the court determined that the Attorney General's claim should not have been dismissed, reversing the trial court.<sup>296</sup>

---

287. *Id.* at 218.

288. *Id.*

289. *Id.* at 218-20.

290. *Id.* at 218.

291. *Id.*

292. *Id.* at 218-19.

293. *Id.* at 219 (quoting *In re Pub. Benevolent Trust of Crume*, 829 N.E.2d 1039, 1044 (Ind. Ct. App. 2005)).

294. *See id.* (citing IND. CODE § 30-4-2-1(b) (2009)).

295. *Id.* (citing IND. CODE § 30-4-5-12 (2000)).

296. *Id.* at 220. The court also held that the local development agreement between East Chicago and Showboat did not bar the Attorney General's action for unjust enrichment. *Id.* at 220-21. The Attorney General's claim for unjust enrichment was a claim based on a "constructive contract[]" implied by law. *Id.* at 221. "When the rights of parties are controlled by an express contract, recovery cannot be based on a theory implied in law." *Id.* (quoting *Keystone Carbon Co. v. Black*, 599 N.E.2d 213, 216 (Ind. Ct. App. 1992)). The Attorney General, or the State, was not a party to the contract between East Chicago and Showboat, and therefore the action for unjust enrichment was not barred. *Id.*



*D. Economic Loss Doctrine*

In *Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C.*,<sup>297</sup> the Indiana Court of Appeals held that the economic loss doctrine precluded the Indianapolis-Marion County Public Library from recovering on its claims relating to a renovation and construction project.<sup>298</sup> The case revolved around the renovation and expansion of the Library's main facility in Indianapolis.<sup>299</sup> Defendant Thornton Tomasetti Engineers (TTE) is an engineering firm hired by the architect to provide structural engineering services.<sup>300</sup> Defendant Burns "was a managing principal of TTE [and] affixed his engineer's seal to the designs."<sup>301</sup> Defendant CCL was an engineering firm hired to perform site inspections but not to perform engineering services.<sup>302</sup> The Library sued the defendants on several theories, including breach of contract, negligence, and gross negligence relating to defects in construction of the underground parking garage.<sup>303</sup> The trial court granted partial summary judgment for defendants, on grounds that the economic loss doctrine barred the negligence claims because there was no personal injury or physical harm to "other property."<sup>304</sup> The Library appealed.<sup>305</sup>

The court held "that the damages claimed by the Library [were] 'economic losses' . . . not recoverable in tort."<sup>306</sup> The court noted that "the economic loss doctrine developed as a way of enforcing the dictates of privity in product liability law and preventing tort remedies from eliminating the customary limitations involved in cases addressing the sale of goods."<sup>307</sup> The court further noted that the economic loss doctrine has three general purposes:

- (1) to maintain the fundamental distinction between tort law and contract law;
- (2) to protect commercial parties' freedom to allocate economic risk by contract; and
- (3) to encourage the party best situated to assess the risk [of] economic loss, the commercial purchaser, to assume, allocate, or insure against that risk.<sup>308</sup>

---

297. 900 N.E.2d 801 (Ind. Ct. App.), *trans. granted*, 919 N.E.2d 547 (Ind. 2009), *aff'd*, 929 N.E.2d 722 (Ind. 2010).

298. *Indianapolis-Marion County Pub. Library*, 900 N.E.2d at 804.

299. *Id.* at 804.

300. *Id.*

301. *Id.* at 805.

302. *Id.* at 805-06.

303. *Id.* at 806-07.

304. *Id.* at 808-09.

305. *Id.* at 809.

306. *Id.* at 809-12.

307. *Id.* at 809 (citing *Hydro Investors, Inc. v. Trafalgar Power, Inc.*, 227 F.3d 8, 18 (2d Cir. 2000)).

308. *Id.* at 810 (quoting *1325 N. Van Buren, LLC v. T-3 Group, Ltd.*, 716 N.W.2d 822, 831

The court stated “[i]n essence, the economic loss doctrine recognizes that contracts and torts encompass distinct areas of law that are intended to resolve different types of claims.”<sup>309</sup>

“Economic loss” includes “consequential losses, such as lost profits, rental expense, diminution in value, and lost time.”<sup>310</sup> Further, economic loss includes “‘damage to the product itself, including costs of its repair or reconstruction . . . even though it may have a component of physical destruction.’”<sup>311</sup> Under the economic loss doctrine, “‘contract is the sole remedy for the failure of a product or service to perform as expected.’”<sup>312</sup>

The court determined that the Library’s damages were not recoverable in tort.<sup>313</sup> The Library contracted with the architect for the entire renovation project—the “product” in question was the entire completed project and not the “components” provided by subcontractors like TTE.<sup>314</sup> Therefore, no damage occurred other than to the property “within the scope of the project itself.”<sup>315</sup> All of the Library’s claimed damages were consequential losses arising from issues related to the design and construction of the property, and therefore were not recoverable in tort.<sup>316</sup>

The court rejected the application of several exceptions to the economic loss doctrine suggested by the Library.<sup>317</sup> The court determined that the economic loss doctrine covers design claims and that the lack of privity between the design professionals and the Library did not prevent application of the doctrine.<sup>318</sup> The exception for conditions imminently dangerous to third persons only applies when actual physical injury has occurred.<sup>319</sup> “Thus, in response to the Library’s question as to whether it ‘should . . . have waited until a catastrophic failure occurred and someone was seriously injured’ prior to suing the appellees in *negligence*, the answer is ‘yes.’”<sup>320</sup> Any “negligent misrepresentation” did not

---

(Wis. 2006)) (paragraph structure altered)).

309. *Id.* (citing *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986)).

310. *Id.* (citing *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150, 154 (Ind. 2005)).

311. *Id.* (citing *Gunkel*, 822 N.E.2d at 154).

312. *Id.* at 811 (quoting *Gunkel*, 822 N.E.2d at 152).

313. *Id.* at 812.

314. *See id.* at 811-12.

315. *Id.* at 812.

316. *Id.*

317. *Id.* at 812-17.

318. *Id.* at 812-14.

319. *Id.* at 815.

320. *Id.* (citation omitted). Judge Brown, in dissent, would find that the economic loss doctrine should not bar recovery against TTE, because TTE owed a professional duty to provide a sound design, and there was “at least a question of fact as to whether TTE created a condition imminently dangerous to third persons.” *Id.* at 818 (Brown, J., concurring in part and dissenting in part).



avoid the economic loss doctrine.<sup>321</sup> No Indiana authority supported a distinction where the defendant provided “services” as opposed to a “tangible product.”<sup>322</sup>

### *E. Statute of Frauds*

In *Indiana Bureau of Motor Vehicles v. Ash, Inc.*,<sup>323</sup> the court determined that a faxed document was an enforceable contract satisfying the statute of frauds, based on a handwritten “Post-It Fax Note” attached to the fax. Starting in 2000, Ash leased two commercial properties to the Indiana Bureau of Motor Vehicles (BMV) for ten years.<sup>324</sup> The terms of the lease for each property included a provision allowing cancellation upon sixty days’ notice by BMV, and allowing modification by written amendment.<sup>325</sup> On January 15, 2003, BMV faxed a proposal to modify the leases to require Ash to make certain improvements to the properties.<sup>326</sup> In return, it was proposed that after the improvements were complete, the leases would be amended to exclude the cancellation clause.<sup>327</sup> The faxed document contained a note indicating “that the fax was sent to ‘Butch’ [owner of Ash] from ‘Marsha’ [representative of BMV].”<sup>328</sup> Ash’s owner signed and returned the proposed terms.<sup>329</sup> BMV prepared a separate “License Branch Lease Amendment,” but neither party ever signed the amendment.<sup>330</sup> Ash completed the proposed renovations to the property.<sup>331</sup> Afterwards, BMV notified Ash that it was cancelling the leases pursuant to the cancellation clause.<sup>332</sup> Ash sued for breach of contract, contending that the leases had been amended to eliminate the cancellation clause.<sup>333</sup> The trial court granted summary judgment for Ash and denied summary judgment for BMV, awarding damages for past rent due but not for future rent.<sup>334</sup> Both parties appealed.<sup>335</sup>

The court determined that the trial court properly concluded that the January 15, 2003 fax was a contract. The court first noted that “[t]he essential elements of a breach of contract action are the existence of a contract, the defendant’s breach thereof, and damages.”<sup>336</sup> Next, “[a]n offer, acceptance, consideration,

---

321. *Id.* at 816-17 (majority opinion).

322. *Id.* at 817.

323. 895 N.E.2d 359 (Ind. Ct. App. 2008).

324. *Id.* at 362-63.

325. *Id.*

326. *Id.* at 363.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.* at 363-64.

334. *Id.* at 364-65.

335. *Id.* at 365.

336. *Id.* at 365 (quoting *Berkel & Co. Contractors, Inc. v. Palm & Assocs., Inc.*, 814 N.E.2d

and a manifestation of mutual assent establish the existence of a contract.”<sup>337</sup> The court held that BMV’s fax of proposed terms to Ash constituted an offer.<sup>338</sup> The fact BMV’s representative drafted the terms indicated BMV’s assent.<sup>339</sup> Consideration existed because BMV agreed to remove the cancellation clauses from the leases in exchange for improvements made to the properties.<sup>340</sup> Ash accepted the offer when its owner wrote on the fax, “I accept the above conditions” and signed his name.<sup>341</sup> Because the January 15, 2003 fax was a contract, the trial court properly concluded that BMV breached the lease and that Ash suffered damages.<sup>342</sup>

The court went on to address the contentions made by BMV in its appellate brief but abandoned at oral argument. Among other arguments, BMV contended that the fax did not bind them because the fax did not comply with Indiana’s Statute of Frauds, Indiana Code section 32-21-1-1.<sup>343</sup> The court disagreed, finding that the terms of the agreement, which was signed on January 15, 2003 and required Ash to complete all work by July 1, 2003, could have been performed within one year.<sup>344</sup> Additionally, the fax was in writing and was signed by the BMV’s representative “Marsha” on the Post-It Fax Note on the bottom of the fax.<sup>345</sup>

With regard to Ash’s cross-appeal on damages, the court affirmed the trial court’s award of past lost rent payments only. The court reviewed the damage award for abuse of discretion.<sup>346</sup> The court noted that “[a] damage award must be supported by probative evidence and cannot be based on speculation, conjecture, or surmise.”<sup>347</sup> Ash presented evidence of both lost rent payments and future rent payments under the lease.<sup>348</sup> But the trial court found that future lost rent payments were speculative because no evidence was presented concerning the *present value* of future rent payments *or* an appropriate discount rate.<sup>349</sup> Although noting that “evidence of present value is not essential to an award of

649, 655 (Ind. Ct. App. 2004)).

337. *Id.* (quoting *Ind. Dep’t of Correction v. Swanson Servs. Corp.*, 820 N.E.2d 733, 737 (Ind. Ct. App. 2005)).

338. *Id.* at 366.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.* at 367.

344. *Id.*

345. *Id.* For the same reason, the court determined that the fax satisfied both Indiana Code section 4-13-2-14.2(a), requiring all contracts with state agencies be in writing, and the provisions of the lease requiring modifications to be in writing and signed by both parties. *Id.* at 366.

346. *Id.* at 368.

347. *Id.* (citing *Crider & Crider, Inc. v. Downen*, 873 N.E.2d 1115, 1118 (Ind. Ct. App. 2007)).

348. *Id.*

349. *Id.*



damages,” the court affirmed the trial court, finding it was within the trial court’s discretion to determine damages were too speculative without evidence of present value.<sup>350</sup>

## IX. CONTRACT INTERPRETATION

*The Winterton, LLC v. Winterton Investors, LLC*<sup>351</sup> involved two competing contracts for the sale of a multi-tenant office park.<sup>352</sup> The first contract was between Winterton as seller and Investors as purchaser.<sup>353</sup> Winterton and Brown entered the second contract, which was “intended to be a back-up to the first.”<sup>354</sup> After no sale occurred under either contract, Investors sued Winterton for breach of contract, and Brown intervened, seeking a declaration that the second contract was effective.<sup>355</sup> The trial court granted partial summary judgment against for Investors, finding a breach of contract.<sup>356</sup> The trial court granted summary judgment against Brown, finding that the second contract was not effective.<sup>357</sup> After a bench trial, the court awarded damages to Investors for breach.<sup>358</sup>

The court of appeals addressed whether the trial court correctly found on summary judgment that Winterton breached the first contract by failing to provide “certificates of estoppel and subordination agreements” and by changing the closing date.<sup>359</sup> The court’s determination turned on interpretation of the contracts and their amendments.

The court recited the rules of interpretation for a written contract:

The construction of a written contract is a pure question of law. The court’s duty is to interpret a contract so as to ascertain the intent of the parties. When interpreting a contract, we attempt to determine the intent of the parties at the time the contract was made by examining the language used in the instrument to express their rights and duties. Where the language of the contract is unambiguous, the parties’ intent is determined from the four corners of the document. The unambiguous language of a contract is conclusive upon the parties to the contract as well as upon the court. We will neither construe unambiguous provisions nor add provisions not agreed upon by the parties.

On the other hand, a contract is ambiguous when a reasonable person

---

350. *Id.*

351. 900 N.E.2d 754 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 988 (Ind. 2009).

352. *Id.* at 755.

353. *Id.* Technically, the contract was between Winterton and Jacob Acquisitions, LLC. *Id.* Jacob Acquisition’s interest was later transferred to Investors. *Id.*

354. *Id.* at 755-56.

355. *Id.* at 756.

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.*

could find its terms susceptible to more than one interpretation.<sup>360</sup>

The court found that Winterton was not required to provide the estoppel certificates under the first contract. The Investor's lender initially required the certificates of estoppel and subordination agreements as a condition of financing.<sup>361</sup> The certificates required the tenants of the office park to provide information on the status of their leases and business operations.<sup>362</sup>

Because the first contract was not contingent on Investors securing financing, Investor's obligations to the lender did not transfer to Winterton.<sup>363</sup> The contract itself did not refer at all to estoppel certificates or subordination agreements.<sup>364</sup> The language of provisions requiring Winterton to provide information regarding the property and to provide documents necessary and usual to close the sale also did not require Winterton to provide estoppel certificates from the tenants.<sup>365</sup> The court found that such an interpretation would be unreasonable, because the interpretation "would impose on Winterton an obligation to require each of its tenants to execute a document the tenants had no obligation to sign," and because "compliance was beyond the control of Winterton to accomplish."<sup>366</sup>

The court further found that Winterton was not required to provide the estoppel certificates under the third amendment to the first contract. The amendment stated that closing was "subject to the receipt and review of estoppels and subordination agreements."<sup>367</sup> The third amendment's language provided that the "closing was subject to the receipt and review of the estoppels and subordination agreements, but it does not say whose obligation was to obtain them."<sup>368</sup> The court reversed the trial court, finding that the contract and amendment could not reasonably be read to impose the obligation on Winterton to obtain the estoppel certificates.<sup>369</sup>

The court further held that Winterton did not breach the contract by changing the closing date. The third amendment specified that the closing date was to be June 28, 2002.<sup>370</sup> The day before closing, counsel for Winterton informed Investors that the closing had been re-scheduled for July 1, 2002.<sup>371</sup> In response, counsel for Investors stated that Counsels could not commit to closing on July 1,

---

360. *Id.* at 759.

361. *Id.* at 757.

362. *Id.*

363. *Id.* at 759.

364. *Id.*

365. *Id.* at 760.

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.* at 761. The court further noted that the existence of an express provision requiring estoppel certificates in the second, backup purchase agreement further demonstrated that no such requirement was intended in the first contract. *Id.*

370. *Id.*

371. *Id.*



2002 until it had received estoppels and subordination agreements from all tenants.<sup>372</sup> The court found that, although the agreement stated that time is of the essence, the actions of the parties showed that Investors waived the essence clause.<sup>373</sup> The court surmised that if Investors would not be ready to close on July 1, it would also not be ready to close on the original date of June 28.<sup>374</sup> Because Investors waived the essence clause, Winterton did not breach the contract by unilaterally changing the closing date.<sup>375</sup>

The court affirmed the trial court's ruling that the second, back-up purchase agreement did not come into effect.<sup>376</sup> Brown, purchaser under the second agreement, argued that the first contract had "terminated" and that the backup agreement was therefore in effect. The backup agreement itself was "*subject to the expiration or termination*" of the first contract.<sup>377</sup> But the backup agreement did not define "termination" or "expiration."<sup>378</sup> Therefore, the backup agreement "contemplates the termination or expiration of the Purchase Agreement either by its own terms or otherwise."<sup>379</sup> The Purchase Agreement itself contained no provision for termination.<sup>380</sup> Without guidance from the agreements themselves, the court determined that the Purchase Agreement was not "terminated."<sup>381</sup>

"For clarification," the court noted that

termination of a contract is different from a breach of contract. Generally, when a contract is terminated, neither party has any further duties or obligations under the contract. On the other hand, when a party breaches a contract, that party may be required to compensate the other party for damages resulting from the breach.<sup>382</sup>

Thus, until "the breach is taken care of, the contract is not terminated."<sup>383</sup>

The court held that, although there was an alleged breach, there was no termination.<sup>384</sup> After the alleged breach, "the parties were continuing to discuss

---

372. *Id.* at 761-62.

373. *Id.* at 762.

374. *Id.*

375. *Id.*

376. *Id.* at 762-64.

377. *Id.* at 762-63.

378. *Id.* at 763.

379. *Id.*

380. *Id.*

381. *Id.* at 763-64.

382. *Id.* (citing *Orthodontic Affiliates, P.C. v. Long*, 841 N.E.2d 219, 222 (Ind. Ct. App. 2006)) (citation omitted)).

383. *Id.*

384. *Id.*

terms under which the Purchase Agreement could proceed to closing” up until Investors filed suit.<sup>385</sup> Additionally, no termination could occur after Investors filed suit, because the parties were asking the court to determine their obligations under the agreement, and because Winterton could not sell property that was the subject of the lawsuit.<sup>386</sup>

---

385. *Id.*

386. *Id.* at 763-64. Additionally, the court determined that the back-up agreement had lapsed and was unenforceable because it set no time limit for the occurrence of the termination and a “reasonable time” had expired with no termination.



# RECENT DEVELOPMENTS IN INDIANA CIVIL PROCEDURE

DANIEL K. BURKE\*

During the survey period,<sup>1</sup> the Indiana Supreme Court and the Indiana Court of Appeals rendered several decisions addressing principles of state procedural law and providing helpful interpretations of the Indiana Rules of Trial Procedure.

## I. INDIANA SUPREME COURT DECISIONS

### A. Standing

In *Thomas v. Blackford County Area Board of Zoning Appeals*,<sup>2</sup> the Indiana Supreme Court clarified the procedure for challenging a litigant's standing. In *Thomas*, Oolman Dairy requested and obtained a special exception to construct and operate a "confined animal feeding operation (CAFO) in an agricultural district in Blackford County."<sup>3</sup> Elizabeth Thomas, whose residence was approximately one-third of a mile from the CAFO, challenged the special exception.<sup>4</sup> Oolman Dairy responded with a Rule 12(B)(6) motion, arguing that Thomas was not an "aggrieved party" as defined by the applicable statute and thus lacked standing to challenge the special exception.<sup>5</sup> The trial court denied the motion but scheduled an evidentiary hearing on the standing issue.<sup>6</sup> Following the hearing, the trial court concluded that Thomas lacked standing and dismissed her challenge.<sup>7</sup>

The court of appeals reversed, holding that by receiving evidence outside the pleadings, the trial court converted Oolman Dairy's motion to dismiss into a motion for summary judgment.<sup>8</sup> Accordingly, the court remanded the matter to enable the parties to "complete their presentation of evidence."<sup>9</sup>

The Indiana Supreme Court granted transfer to consider the proper procedure for a challenge to a litigant's standing.<sup>10</sup> The supreme court began its analysis by noting that a party can challenge standing with a Rule 12(B)(6) motion to

---

\* Partner, Hoover Hull LLP, Indianapolis, Indiana. B.S., 1994, Indiana University—Bloomington; J.D., 1999, *cum laude*, Southern Methodist University Dedman School of Law. The views expressed herein are solely those of the author.

1. This Article discusses select Indiana Supreme Court and Indiana Court of Appeals decisions during the survey period from October 1, 2008, through September 30, 2009, as well as amendments to the Indiana Rules of Trial Procedure that the Indiana Supreme Court ordered during the survey period.

2. 907 N.E.2d 988 (Ind. 2009).

3. *Id.* at 990.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* (citing *Huffman v. Ind. Office of Env'tl. Adjudication*, 811 N.E.2d 806, 813 (Ind. 2004)).

dismiss for failure to state a claim. But this would require that the lack of standing “be apparent on the face of the complaint.”<sup>11</sup> Because resolution of the standing challenge in the instant case required consideration of evidence outside the pleadings, the court affirmed the trial court’s dismissal of Oolman Dairy’s Rule 12(B)(6) motion; however, because no “factual backup” had been supplied, the court held that the standing challenge could not be treated as a summary judgment motion under Trial Rule 56.<sup>12</sup>

The court concluded that a hearing related to a standing challenge where evidence must be received “like a hearing on a motion to dismiss for lack of personal jurisdiction . . . is a hearing at which factual issues may be resolved and factual determinations are reversed on appeal only if clearly erroneous.”<sup>13</sup> The court concluded that it could not determine that the trial court’s evaluation of conflicting evidence was clearly erroneous and, therefore, affirmed the trial court.<sup>14</sup>

### *B. Involuntary Dismissal*

In *City of East Chicago v. East Chicago Second Century, Inc.*,<sup>15</sup> the court revisited the proper standard for ruling on a motion to dismiss for failure to state a claim pursuant to Trial Rule 12(B)(6). In 1996, Showboat Marina Partnership applied for and obtained a license to operate a riverboat casino in East Chicago, Indiana.<sup>16</sup> Showboat then entered into a local development agreement with the city of East Chicago, whereby Showboat agreed to make annual contributions based on a percentage of its gross receipts.<sup>17</sup> A portion of the contribution was to be directed to the for-profit corporation East Chicago Second Century, Inc.<sup>18</sup> Ownership of the casino was transferred several times between 1996 and 2005, until RIH Acquisitions IN, LLC acquired it in April 2005.<sup>19</sup> Shortly before of the transfer to RIH, Second Century filed an action seeking a declaration that RIH would be required to continue making payments to Second Century.<sup>20</sup> The Indiana Attorney General intervened and sought imposition of a constructive trust as to any funds paid to Second Century.<sup>21</sup> Second Century filed a motion to dismiss, which the trial court granted and the court of appeals affirmed.<sup>22</sup>

The Indiana Supreme Court granted transfer and reinstated many of the

---

11. *Id.* (citing *Huffman*, 811 N.E.2d at 814).

12. *Id.*

13. *Id.* at 991 (citing *Bagnall v. Town of Beverly Shores*, 726 N.E.2d 782, 786 (Ind. 2000)).

14. *Id.*

15. 908 N.E.2d 611 (Ind. 2009).

16. *Id.* at 615.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 616.

21. *Id.*

22. *Id.*



dismissed claims, following a discussion of the proper standard for motions to dismiss under Trial Rule 12(B)(6).<sup>23</sup> Although decided approximately two years after *Bell Atlantic Corp. v. Twombly*,<sup>24</sup> in which the U.S. Supreme Court held that a complaint must allege sufficient factual allegations to demonstrate a “plausible” claim for relief,<sup>25</sup> the Indiana Supreme Court did not deter from the established principles of Indiana law governing motions to dismiss for failure to state a claim.<sup>26</sup> First, the court noted that a motion to dismiss for failure to state a claim is intended to “test[] the legal sufficiency of the claim, not the facts supporting it.”<sup>27</sup> The court next explained that reviewing courts must view pleadings in the light most favorable to the non-movant, with every inference resolved in the non-movant’s favor.<sup>28</sup> The court then explained:

Inasmuch as motions to dismiss are not favored by the law, they are properly granted only “when the allegations present no possible set of facts upon which the complainant can recover.” Put another way, a dismissal under Rule 12(B)(6) will not be affirmed “unless it is apparent that the facts alleged in the challenged pleading are incapable of supporting relief under any set of circumstances.”<sup>29</sup>

The court then applied this standard to each of the claims asserted by the Attorney General and reinstated several of them.<sup>30</sup>

### C. Consolidation

1. *Consolidation Under Trial Rule 42(A).*—In *Wagler v. West Boggs Sewer District, Inc.*,<sup>31</sup> the court considered the propriety of consolidation of actions under Trial Rule 42(A). West Boggs Sewer District, Inc. sought easements to construct facilities; however, when three property owners would not donate the easements and rejected West Boggs’s offer of compensation, West Boggs brought condemnation actions against each of the three property owners.<sup>32</sup> West Boggs filed a motion for consolidation in one of the cases and served the motion on attorneys representing all three property owners.<sup>33</sup> West Boggs then filed a summary judgment motion, seeking summary judgment in all three cases.<sup>34</sup> Only

---

23. *Id.* at 616-17.

24. 550 U.S. 544 (2007).

25. *Id.* at 555-56.

26. *E. Chicago*, 908 N.E.2d at 617.

27. *Id.* (citing *Charter One Mortgage Corp. v. Condra*, 865 N.E.2d 602 (Ind. 2007)).

28. *Id.*

29. *Id.* (quoting *Mart v. Hess*, 703 N.E.2d 190, 193 (Ind. Ct. App. 1998); *Couch v. Hamilton County*, 609 N.E.2d 39, 41 (Ind. Ct. App. 1993)).

30. *Id.* at 617-22.

31. 898 N.E.2d 815 (Ind. 2008).

32. *Id.* at 817.

33. *Id.* at 820.

34. *Id.*

one property owner responded.<sup>35</sup> The trial court granted summary judgment in favor of West Boggs as to the responding property owner.<sup>36</sup> On the trial court's instruction, West Boggs then filed summary judgment motions in each of the other cases, referencing the judgment in the first case.<sup>37</sup>

The court granted transfer to consider, among other issues, the trial court's consolidation of the three condemnation actions.<sup>38</sup> The property owners challenged the propriety of the trial court's consolidation under Trial Rule 42(A),<sup>39</sup> arguing that the actions did not involve common questions of law or fact because there were different parties and different property values involved.<sup>40</sup> But the court reasoned that, because each of the property owners raised a common legal defense, i.e., whether West Boggs made a good faith offer to purchase the easements, and because each of the property owners had ample notice of and opportunity to respond to the summary judgment motion, the trial court did not abuse its discretion in ordering the consolidation under Trial Rule 42(A).<sup>41</sup>

2. *Consolidation Under Trial Rule 42(D)*.—In *State ex rel. Curley v. Lake Circuit Court*,<sup>42</sup> the court considered the propriety of consolidation of actions under Trial Rule 42(D). On October 2, 2008, John Curley, Lake County Indiana Republican Central Committee Chairman, filed an action in Lake County Superior Court relating to operation of "early voting sites."<sup>43</sup> Four days later, on October 6, 2008, a number of parties filed an action in Lake County Circuit Court regarding the same sites.<sup>44</sup>

Immediately following the filing of the superior court action on October 2, the defendant, Lake County Board of elections ("the Board"), removed the matter to the U.S. District Court for the Northern District of Indiana.<sup>45</sup> Nevertheless, the following day, the superior court entered a temporary restraining order, requiring that the Board not open early voting sites.<sup>46</sup> When the circuit court action was filed a few days later on October 6, the circuit court entered a temporary

---

35. *Id.*

36. *Id.* at 822.

37. *Id.*

38. *Id.* at 817.

39. Indiana Trial Rule 42(A) provides:

When actions involving a common question of law or fact are pending before the court, [the court] may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

IND. TRIAL R. 42(A).

40. *Wagler*, 898 N.E.2d at 821.

41. *Id.* at 821-22.

42. 899 N.E.2d 1271 (Ind. 2008).

43. *Id.* at 1271.

44. *Id.*

45. *Id.* at 1272.

46. *Id.*



restraining order directing that the Board open the early voting sites.<sup>47</sup> The federal district court remanded the superior court case back to the superior court.<sup>48</sup> The next day, on October 14, the circuit court entered a preliminary injunction directing that the Board open the early voting sites.<sup>49</sup>

In an original action, the court sought to untangle the situation.<sup>50</sup> Citing Trial Rule 42(D),<sup>51</sup> the court concluded that the circuit court case, as the later-filed matter, should be consolidated into the superior court action.<sup>52</sup> But the court also concluded that the preliminary injunction entered by the circuit court would remain in effect, pending any action by the superior court.<sup>53</sup>

#### *D. Summary Judgment*

In *Estate of Mintz v. Connecticut General Life Insurance Co.*,<sup>54</sup> the court reversed the trial court's entry of summary judgment, concluding that issues of proximate cause and whether defendants acted reasonably were issues the trier of fact had to resolve.

As a thirty-plus year Indiana University professor, Mintz received full and basic supplemental life insurance coverage under a group plan through Connecticut General Life Insurance Co. ("Connecticut General").<sup>55</sup> Mintz's coverage would be reduced substantially upon his sixty-fifth birthday, unless he contacted Gruber, Connecticut General's agent servicing Indiana University employees, to make arrangements to convert the group coverage to an individual policy.<sup>56</sup> Gruber advised Mintz that he would take care of everything.<sup>57</sup> But Gruber misquoted the premium amount, resulting in Mintz's failing to provide sufficient funds to convert to individual policies with the same coverage levels.<sup>58</sup>

---

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. Indiana Trial Rule 42(D) provides in pertinent part:

When civil actions involving a common question of law or fact are pending in different courts, a party to any of the actions may, by motion, request consolidation of those actions for the purpose of discovery and any pre-trial proceedings. Such motion[s] may only be filed in the court having jurisdiction of the action with the earliest filing date and the court shall enter an order of consolidation for the purpose of discovery and . . . pre-trial proceedings unless good cause to the contrary is shown and found by the court to exist.

IND. TRIAL R. 42(D).

52. *Curley*, 899 N.E.2d at 1273.

53. *Id.*

54. 905 N.E.2d 994 (Ind. 2009).

55. *Id.* at 996.

56. *Id.*

57. *Id.*

58. *Id.* at 997.

Mintz sued and the jury returned a verdict in favor of Gruber on Mintz's negligence claim.<sup>59</sup> The court of appeals reversed and remanded based on an erroneous negligence instruction.<sup>60</sup> On remand, the trial court granted Gruber's motion for summary judgment as to Mintz's negligence claim, and the court of appeals affirmed.<sup>61</sup>

The court granted transfer and reversed the trial court's entry of summary judgment, noting, "summary judgment is generally inappropriate in negligence cases because issues of contributory negligence, causation, and reasonable care are more appropriately left for the trier of fact."<sup>62</sup> The court concluded that issues of whether Gruber acted reasonably under the circumstances and whether his negligence, if any, was the proximate cause of Mintz's injuries were issues that the trier of fact should determine.<sup>63</sup>

### *E. New Trial*

In *Henri v. Curto*,<sup>64</sup> the court examined whether allegations of jury misconduct would warrant a new trial. Henri and Curto were students at Butler University when they met at a campus party in March 2004.<sup>65</sup> After consuming alcohol at the party, they left together and engaged in sexual intercourse in a dorm room.<sup>66</sup> Shortly thereafter, Henri sued Curto, alleging lack of consent.<sup>67</sup> Curto counterclaimed, alleging tortious interference with his contract with the university.<sup>68</sup> After trial, the jury found in favor of Curto and against Henri, awarding Curto \$45,000 on his counterclaim.<sup>69</sup>

Following the denial of her motion for new trial pursuant to Trial Rule 59, Henri appealed, claiming jury misconduct.<sup>70</sup> Specifically, Henri claimed that the jury received improper external communications<sup>71</sup> because: (1) the bailiff answered a jury question without referring it to the judge; (2) the jury was improperly instructed as to the need for unanimity; (3) a juror answered a cell phone call during deliberations; and (4) an alternate juror improperly communicated with the regular jurors during the trial and deliberations.<sup>72</sup>

---

59. *Id.* at 998.

60. *Id.*

61. *Id.*

62. *Id.* at 999 (quoting *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522, 527 (Ind. Ct. App. 2004)).

63. *Id.* at 999-1000.

64. 908 N.E.2d 196 (Ind. 2009).

65. *Id.* at 199.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*



The court first addressed the issue of responding to a jury question without involving counsel.<sup>73</sup> The court observed that the “better practice” is for the judge to advise the parties and their counsel of the jury’s question and that failure to adhere to this practice results in a rebuttable presumption of error.<sup>74</sup> In determining whether the presumption is rebutted, the court evaluated the nature of the communication to the jury and what effect it might have had on deliberations.<sup>75</sup> Because the trial court had previously instructed the jury that its verdict must be unanimous, the court’s communication to the jury through the bailiff of this same information was neither new nor prejudicial to Henri.<sup>76</sup> Further, the court was unable to conclude that the bailiff’s answer regarding the necessity of a unanimous verdict was “coercive, or that it resulted in juror coercion or deception, or that it resulted in an unfair trial.”<sup>77</sup> The court next determined that, though undesirable and ideally avoided, the juror’s cell phone use did not constitute sufficient juror misconduct to warrant a new trial, i.e., Henri could not show that the cell phone use constituted gross misconduct and that it probably harmed her.<sup>78</sup> Finally, the court concluded that the participation of an alternate juror, which primarily consisted of inappropriate gestures, was annoying but did not amount to jury misconduct.<sup>79</sup>

#### *F. Preliminary Injunction*

In *Roberts v. Community Hospitals of Indiana, Inc.*,<sup>80</sup> the court considered whether a trial court can consolidate a preliminary injunction hearing with a trial on the merits without notice to the parties—a matter of first impression in Indiana.<sup>81</sup> John Roberts, a former medical resident in Community Hospital’s Family Medicine Residency Program, sought to enjoin the termination of his medical residency contract.<sup>82</sup> Following a number of difficulties, including unexcused absences, poor performance, and unprofessional behavior, Community terminated Roberts’s contract.<sup>83</sup> Roberts filed suit, seeking a temporary restraining order and preliminary injunction reinstating him as a resident.<sup>84</sup> Following a hearing, the trial court requested that the parties submit proposed

---

73. *Id.* at 200.

74. *Id.* at 200-01 (citing *Rogers v. R.J. Reynolds Tobacco Co.*, 745 N.E.2d 793, 796 (Ind. 2001)).

75. *Id.* at 201 (citing *Smith v. Convenience Store Distrib. Co.*, 583 N.E.2d 735, 738 (Ind. 1992)).

76. *Id.*

77. *Id.* at 202.

78. *Id.* at 202-03.

79. *Id.* at 203.

80. 897 N.E.2d 458 (Ind. 2008).

81. *Id.* at 468-69.

82. *Id.* at 460-61.

83. *Id.* at 461-62.

84. *Id.* at 462.

findings of fact and conclusions of law.<sup>85</sup>

Without notice to the parties, the trial court consolidated the preliminary injunction hearing with the trial on the merits in accordance with Trial Rule 65(A)(2), denied Roberts' request for a preliminary injunction, and entered final judgment in Community's favor.<sup>86</sup> Roberts filed a motion to correct errors, challenging the consolidation and asserting that he would have offered additional evidence if he had notice of the consolidation.<sup>87</sup> Roberts appealed, and the court of appeals reversed and remanded.<sup>88</sup>

The Indiana Supreme Court granted transfer to address the issue of first impression of whether—and under what circumstances—a trial court may consolidate a preliminary injunction hearing with a trial on the merits without notice to the parties.<sup>89</sup> The court began its analysis by noting that neither Trial Rule 65(A)(2), nor its federal counterpart, expressly require that a trial court provide notice in advance of consolidation.<sup>90</sup> Looking to decisions of various federal courts, the court concluded that “the prevailing federal rule has long been that consolidation without notice is not reversible error absent a showing of prejudice.”<sup>91</sup> As to what would constitute a sufficient showing of prejudice, the court held:

[P]rejudice requires more than simply identifying steps that might possibly produce evidence not adduced at the preliminary injunction stage. Bare assertions that discovery was incomplete or witnesses were not called will not suffice, at least where, as here, there was time for significant discovery. Rather, prejudice from a surprise consolidation ordinarily requires either admissible, material evidence that would be produced at trial and that would have likely changed the outcome on the merits, or a persuasive showing why available evidence was not accessible in the time between filing the complaint and the hearing.<sup>92</sup>

The court observed that Roberts had done no more than recite a list of actions he would have taken had the court notified him of the consolidation.<sup>93</sup> This, the court concluded, was not sufficient to show prejudice; therefore, the court held that the trial court's consolidation without notice was error, but not reversible error.<sup>94</sup>

---

85. *Id.*

86. *Id.*

87. *Id.* at 462-63.

88. *Id.* at 463.

89. *Id.* at 464.

90. *Id.*

91. *Id.* at 465 (citing *Eli Lilly & Co. v. Generix Drug Sales, Inc.*, 460 F.2d 1096, 1106 (5th Cir. 1972)).

92. *Id.* at 466.

93. *Id.*

94. *Id.* at 467-68.



## II. INDIANA COURT OF APPEALS DECISIONS

### *A. Subject Matter Jurisdiction*

In *Hart v. Webster*,<sup>95</sup> the court of appeals reversed the trial court's dismissal with prejudice of the plaintiff's claims against his former employer.<sup>96</sup> William Hart was a vice president for the Steak-n-Shake Company (SNS).<sup>97</sup> SNS requested that Webster, SNS's director of quality assurance, investigate Hart's activities, especially his dealings with vendors.<sup>98</sup> After Hart was cleared of all wrongdoing, he filed suit against SNS and Webster, alleging that Webster's disclosure of information concerning the allegations caused Hart severe mental, emotional, and physical harm.<sup>99</sup> SNS and Webster moved to dismiss pursuant to Trial Rule 12(B)(1), claiming the court lacked subject matter jurisdiction because Hart's claims, including physical injury and inability to work, fell within the exclusive province of the Workers Compensation Board.<sup>100</sup> The trial court ultimately granted the motion and dismissed Hart's complaint "with prejudice."<sup>101</sup>

The court of appeals noted on appeal that Hart amended his complaint, removing his allegations of physical injury and inability to work,<sup>102</sup> accordingly, the court determined that the trial court had subject matter jurisdiction over Hart's amended complaint.<sup>103</sup> Moreover, the court concluded a dismissal for lack of subject matter jurisdiction cannot operate as a dismissal with prejudice; therefore, the dismissal of his earlier pleadings did not bar him from filing an amended complaint.<sup>104</sup>

### *B. Personal Jurisdiction*

In *Attaway v. Omega*,<sup>105</sup> the Indiana Court of Appeals affirmed the trial court's denial of a motion to dismiss for lack of personal jurisdiction.<sup>106</sup> Llexcyiss Omega and D. Dale York listed a Porsche for sale on eBay, and the Attaways were the winning bidders.<sup>107</sup> After taking delivery of the vehicle, the Attaways persuaded MasterCard to rescind payment to Omega and York,

---

95. 894 N.E.2d 1032 (Ind. Ct. App. 2008).

96. *Id.* at 1036, 1038.

97. *Id.* at 1034.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 1036.

102. *Id.* at 1035.

103. *Id.* at 1037.

104. *Id.*

105. 903 N.E.2d 73 (Ind. Ct. App. 2009).

106. *Id.* at 76, 80.

107. *Id.* at 75.

contending that the vehicle was not as described on eBay.<sup>108</sup> Omega and York filed suit against the Attaways to recover the purchase price and other delivery costs.<sup>109</sup> The Attaways moved to dismiss, claiming that the court lacked personal jurisdiction, and the trial court denied the motion.<sup>110</sup>

On appeal, the court of appeals concluded that, in bidding on the vehicle, the Attaways could see that the vehicle was located in Indiana and likely considered that to be a factor, especially because the Attaways would be responsible for paying delivery expenses.<sup>111</sup> The court concluded that, by submitting a bid, thereby agreeing “to appear, in person or by representative” to take delivery of the vehicle, and by making arrangements to have the vehicle transported from Indiana to their home in Idaho, the Attaways purposefully availed themselves of “the privilege of conducting activities within the State of Indiana,” and “could reasonably anticipate defending a lawsuit in Indiana related to this eBay purchase.”<sup>112</sup>

### C. Service of Process

In *Evans v. State*,<sup>113</sup> the Indiana Court of Appeals reversed the trial court’s dismissal of Beulah Evans’s petition for judicial review.<sup>114</sup> Evans sought judicial review of an administrative denial of Medicaid benefits.<sup>115</sup> She served a summons on the Indiana Attorney General and Governor Mitch Daniels, but did not serve the executive director of the Indiana Family & Social Services Administration (IFSSA).<sup>116</sup> Under Trial Rule 4.6(A)(3), service upon state governmental organizations requires service on both the attorney general and the executive officer of the organization.<sup>117</sup> But relying on Trial Rule 4.15(F),<sup>118</sup> the court concluded that service on the attorney general and the governor was sufficient to give the IFSSA notice of the suit and was reasonably calculated to inform the IFSSA of the action.<sup>119</sup>

---

108. *Id.*

109. *Id.* at 76.

110. *Id.*

111. *Id.* at 79.

112. *Id.*

113. 908 N.E.2d 1254 (Ind. Ct. App. 2009), *reh’g denied*, No. 21A01-0903-CV-152, 2009 Ind. app. LEXIS 1639 (Ind. Ct. App. Sept. 15, 2009).

114. *Id.* at 1255, 1259.

115. *Id.* at 1256.

116. *Id.*

117. *Id.* at 1258.

118. Indiana Trial Rule 4.15(F) provides:

No summons or the service thereof shall be set aside or be adjudged insufficient when either is reasonably calculated to inform the person to be served that an action has been instituted against him, the name of the court, and the time within which he is required to respond.

119. *Evans*, 908 N.E.2d at 1258-59.



*D. Venue*

In *Gulf Stream Coach, Inc. v. Cronin*,<sup>120</sup> Gulf Stream Coach, Inc. (“Gulf Stream”) appealed the trial court’s denial of its motion to transfer venue pursuant to Trial Rule 12(B)(3).<sup>121</sup> The Indiana Court of Appeals reversed the trial court’s decision and remanded with instructions.<sup>122</sup>

The Cronins purchased a recreational vehicle (RV) from Gulf Stream and immediately began to suffer a litany of problems with the RV that Gulf Stream was not able to remedy.<sup>123</sup> The RV’s owner’s manual required that any warranty litigation be initiated in Indiana, so the Cronins parked the RV in a parking lot near their attorney’s office in Madison County and filed suit against Gulf Stream in Madison County.<sup>124</sup> Gulf Stream moved to dismiss or transfer venue pursuant to Rule 12(B)(3), arguing that Elkhart County, the location of Gulf Stream’s principal office, was the preferred venue under Rule 75.<sup>125</sup> The trial court denied the motion, reasoning that Madison County was also a preferred venue, and Gulf Stream appealed.<sup>126</sup>

The court of appeals first remarked that Elkhart County would be a preferred venue under Rule 75(A)(3) because it where Gulf Stream’s principal office is located.<sup>127</sup> But the court also noted that there are often multiple preferred venue counties for a case, and, if a case is filed in a preferred venue county, the trial court cannot transfer venue to another preferred venue.<sup>128</sup> Accordingly, the court had to determine whether Madison County was also a preferred venue under Rule 75(A)(2), which would require that the RV was a chattel that was regularly located or kept in Madison County.<sup>129</sup> Finding no discussion of the term “regularly” in any Indiana appellate opinions, the court turned to the dictionary to define “regular” as “customary, usual, or normal.”<sup>130</sup> Because the Cronins had no connection with Indiana other than this lawsuit, the court concluded that Madison County was not the location where the RV was regularly kept. Therefore, the trial court erred in denying the motion to transfer venue from a non-preferred venue to a preferred venue.<sup>131</sup>

---

120. 903 N.E.2d 109 (Ind. Ct. App. 2009).

121. *Id.* at 110-11.

122. *Id.* at 110.

123. *Id.* at 111.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 112.

128. *Id.* at 111-12 (citing *Randolph County v. Chamness*, 879 N.E.2d 555, 556 (Ind. 2008)).

129. *Id.* at 112.

130. *Id.* at 113 (quoting WEBSTER’S II NEW COLLEGE DICTIONARY 934 (2001)).

131. *Id.*

### *E. Recusal*

In *Ross v. Rudolph*,<sup>132</sup> the Rosses and their law firm, The Law Group of Ross and Brunner, (together “Ross”) appealed the trial court’s order setting aside a summary judgment previously entered in Ross’s favor where the trial court judge sua sponte recused himself the same day.<sup>133</sup> The Indiana Court of Appeals affirmed.<sup>134</sup>

In 1994, a hexane gas explosion at a Central Soya facility in Indianapolis injured Rudolph and others (together “Rudolph”).<sup>135</sup> Rudolph retained Ross to represent them in litigation against Central Soya.<sup>136</sup> Rudolph sued Ross for an accounting of the settlement Ross negotiated with Central Soya.<sup>137</sup> By orders dated January 24, 2008, and August 22, 2008, the trial court entered summary judgment in favor of Ross.<sup>138</sup> On January 6, 2009, the trial court entered an order setting aside the summary judgment in Ross’ favor and sua sponte recused himself.<sup>139</sup> The chronological case summary does not reveal which order came first.<sup>140</sup> Ross appealed the order setting aside summary judgment.<sup>141</sup>

On appeal, the court of appeals framed the issue as whether the trial court had authority to set aside the summary judgment in light of the judges’ recusal.<sup>142</sup> The court next observed that “a judge may not render a substantive ruling in a case where a recusal was issued simultaneously”; rather, once a judge has recused himself, he may not render any substantive ruling in the case.<sup>143</sup> But in this case, the record was unclear whether the trial court issued the order setting aside summary judgment before or after the judge recused himself.<sup>144</sup> Accordingly, the court presumed that the trial court did not set aside the summary judgment after the recusal and affirmed the trial court’s order.<sup>145</sup>

### *F. Pleadings*

1. *Challenge to Execution of Instrument Attached to Pleadings.*—In *Baldwin v. Tippecanoe Land & Cattle Co.*,<sup>146</sup> the Indiana Court of Appeals affirmed the

---

132. 913 N.E.2d 218 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 560 (Ind. 2009).

133. *Id.* at 219.

134. *Id.* at 220.

135. *Id.* at 219.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 220.

141. *Id.*

142. *Id.*

143. *Id.* (citing *Thacker v. State*, 563 N.E.2d 1307, 1309 (Ind. Ct. App. 1990)).

144. *Id.*

145. *Id.*

146. 912 N.E.2d 902 (Ind. Ct. App. 2009), *trans. denied*, 2010 Ind. LEXIS 239 (Ind. Mar. 11, 2010).



trial court's entry of summary judgment.<sup>147</sup> The plaintiff mortgagee filed a complaint to foreclose a second mortgage on the defendant mortgagor's property and attached copies of a promissory note and mortgage.<sup>148</sup> The defendant responded with a general, unverified denial under Trial Rule 8(B).<sup>149</sup> The plaintiff moved for summary judgment, attaching the promissory note and mortgage to its designation of evidence.<sup>150</sup> The defendant opposed summary judgment, arguing that the mortgage was unenforceable because the note was not signed and was not attached to the mortgage.<sup>151</sup> The trial court granted summary judgment, and the defendant appealed.<sup>152</sup>

The court began its analysis with Trial Rule 9.2(B), which provides that the execution is deemed to be established where a document upon which a pleading is founded is attached to the pleading and execution is not denied under oath.<sup>153</sup> The court also noted that a general denial under Trial Rule 8(B) is subject to the provisions of Rule 11, and "Trial Rule 11(B) makes clear that, where a verification or oath is required, the person signing must acknowledge that his or her statements are true and made under penalty of perjury."<sup>154</sup> Reading these Trial Rules 8(B), 9.2(B) and 11(B) together, the court concluded that a general denial "does not constitute an oath by which the pleader denies the execution of an instrument attached to a claim."<sup>155</sup>

2. *Amendment to Conform to the Evidence.*—In *Deel v. Deel*,<sup>156</sup> the court of appeals affirmed that the trial court could modify the language of a divorce decree by interpreting it, but the court of appeals chose a different result from that of the trial court.<sup>157</sup> The wife filed a Rule to Show Cause why the court should not hold the husband in contempt for violating various provisions of the couple's divorce decree.<sup>158</sup> The wife argued that cash payments the husband was required to make were pursuant to a property settlement and did not constitute spousal maintenance. Therefore, the husband should not have been deducting the payments from his income tax return, and the wife should not have been required to pay income taxes on the payments.<sup>159</sup> The trial court declined to hold the husband in contempt for deducting the payments but clarified that the husband's cash payments were a property settlement, not spousal maintenance, and ordered

---

147. *Id.* at 903.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 904.

152. *Id.*

153. *Id.*

154. *Id.* at 905.

155. *Id.*

156. 909 N.E.2d 1028 (Ind. Ct. App. 2009).

157. *Id.* at 1032, 1035.

158. *Id.* at 1031.

159. *Id.*

the husband to modify his tax returns accordingly.<sup>160</sup>

The husband appealed, arguing that the wife's affidavit in support of her Rule to Show Cause filing did not discuss modification of the decree; accordingly, the husband argued he did not have adequate notice.<sup>161</sup> The court of appeals concluded that, because the husband's counsel did not object to—and agreed with—the wife's counsel's statement at the outset of the hearing that modification of the cash payment provision was an issue to be determined, the husband waived his right to object later.<sup>162</sup> The court concluded that, under Trial Rule 15(B), the issue had been tried by the express or implied consent of the parties, so the issue "shall be treated in all respects as if [it] had been raised in the pleadings."<sup>163</sup>

### G. Intervention

In *In re Paternity of Duran*,<sup>164</sup> the Indiana Court of Appeals affirmed the trial court's denial of a motion to intervene pursuant to Trial Rule 24.<sup>165</sup> On January 15, 1985, Maria E. Duran ("Duran") was born out of wedlock to Maria I. Duran ("Maria") and Joseph Regalado ("Joseph").<sup>166</sup> Maria passed away two years later, and her parents sought to adopt Duran.<sup>167</sup> When Joseph was served with personal notice of the adoption proceedings and failed to respond, the trial court entered a default order terminating his parental rights and subsequently entered an order permitting Duran's grandparents to adopt her.<sup>168</sup>

In 1991, Joseph was severely injured during an altercation with Chicago police officers and was adjudicated a disabled person.<sup>169</sup> A guardianship estate was opened with Joseph's father, Baltasar Regalado ("Baltasar") appointed as Joseph's guardian.<sup>170</sup> On Joseph's behalf, Baltasar sued the City of Chicago and settled the case for \$15 million.<sup>171</sup>

In 2000, Duran learned that Joseph, her biological father, was still alive and sought to establish a relationship with him.<sup>172</sup> Duran commenced a paternity action in Illinois in October 2003.<sup>173</sup> The day after Joseph's death on October 23,

---

160. *Id.* at 1031-32.

161. *Id.* at 1033.

162. *Id.* at 1033-34.

163. *Id.* at 1033 (quotation omitted).

164. 900 N.E.2d 454 (Ind. Ct. App. 2009), *reh'g denied*, No. 64A03-0702-JV-66, 2009 Ind. App. LEXIS 1618 (Ind. Ct. App. May 14, 2009).

165. *Id.* at 466.

166. *Id.* at 456-57.

167. *Id.* at 457.

168. *Id.*

169. *Id.*

170. *Id.* at 458.

171. *Id.*

172. *Id.*

173. *Id.*



2004, the Illinois court determined it did not have jurisdiction.<sup>174</sup> Duran then filed a paternity action in Indiana on October 26, 2004.<sup>175</sup> Approximately one year later, Baltasar sought to intervene in the paternity action, arguing that the determination that Joseph was Duran's biological father could affect Baltasar's status as the sole heir of Joseph's multi-million dollar estate.<sup>176</sup> The trial court denied Baltasar's motion.<sup>177</sup>

The court of appeals began its review with an analysis of the requirements for intervention as a matter of right under Trial Rule 24(A).<sup>178</sup> The court articulated a three-part test for determining whether intervention as of right is appropriate: "The intervenor must demonstrate: (1) that he has an interest in the subject of the action; (2) that disposition in the action may as a practical matter impede protection of that interest; and (3) that representation of the interest by existing parties is inadequate."<sup>179</sup> The court agreed with the trial court's determination that any interest Baltasar had in the paternity action was "merely indirect and derivative" and thus would not justify intervention as a matter of right.<sup>180</sup>

#### *H. Involuntary Dismissal*

In *In re M.D.*,<sup>181</sup> the Indiana Court of Appeals remanded a matter to the trial court with instructions that the trial court must supply written findings of fact and conclusions of law when requested by a party, even if the request is made by motion before an evidentiary hearing.<sup>182</sup>

A mother (B.D.) and father (H.D.) have three children, the youngest of whom (M.D.) was two months old on August 21, 2008.<sup>183</sup> On that date, when B.D. picked M.D. up from daycare, he seemed fussier than normal and continued to be fussy throughout the weekend.<sup>184</sup> The following Monday, B.D. took M.D. to the doctor's office and learned that he had suffered a broken leg, which the doctor determined had resulted from "non-accidental trauma."<sup>185</sup> A referral was made to the Indiana Department of Child Services (DCS), which took custody of all three children and filed Children in Need of Services (CHINS) petitions.<sup>186</sup>

Before the two-day evidentiary hearing regarding the CHINS petitions, both

---

174. *Id.*

175. *Id.*

176. *Id.* at 459-60.

177. *Id.*

178. *Id.* at 466-67.

179. *Id.* at 467 (citing *In re Paternity of E.M.*, 654 N.E.2d 890, 892 (Ind. Ct. App. 1995)).

180. *Id.* at 468.

181. 906 N.E.2d 931 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 551 (Ind. 2009).

182. *Id.* at 933.

183. *Id.* at 932.

184. *Id.*

185. *Id.*

186. *Id.*

parties filed motions requesting findings of fact and conclusions of law pursuant to Trial Rule 52(A).<sup>187</sup> Following the DCS's presentation of evidence in support of its CHINS petitions, the parents orally moved to dismiss the petitions pursuant to Trial Rule 41(B).<sup>188</sup> DCS appealed the trial court's dismissal of the petitions without providing written findings of fact or conclusions of law.<sup>189</sup>

On appeal, the court noted that Trial Rule 41(B) requires that, if requested at the time of the motion, the trial court must make findings of fact and conclusions of law when rendering judgment under Rule 41(B).<sup>190</sup> Here, the parties made their Rule 52(A) motions before the hearing, not at the time of the Rule 41(B) motion.<sup>191</sup> But the court concluded that the "best practice and policy for a trial court" is to issue findings of fact and conclusions of law in connection with granting a Rule 41(B) motion, even if the requests are made before the motion.<sup>192</sup> Accordingly, the court remanded the matter to the trial court with instructions to prepare findings of fact and conclusions of law supporting its grant of the parents' Rule 41(B) motion to dismiss.<sup>193</sup>

### *I. Discovery*

In *May v. George*,<sup>194</sup> Dwight May sued Jerry George after sustaining injury caused by a tree that fell from George's property.<sup>195</sup> The Indiana Court of Appeals affirmed the trial court's grant of summary judgment in favor of George.<sup>196</sup>

May filed a complaint, alleging negligence against George, after a tree fell from George's property onto May's vehicle, damaging the truck and injuring May.<sup>197</sup> George moved for summary judgment, arguing that a "rural landowner does not owe a duty to protect others outside the land from physical harm caused by a natural condition of the land."<sup>198</sup> May opposed the summary judgment motion by presenting, among others, the affidavit of his son, Austin, who claimed that he was familiar with the area and that the tree was in noticeably poor condition.<sup>199</sup> The trial court granted George's motion to strike Austin's affidavit and granted summary judgment in George's favor.<sup>200</sup>

---

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 932-33.

191. *Id.* at 933.

192. *Id.*

193. *Id.*

194. 910 N.E.2d 818 (Ind. Ct. App. 2009).

195. *Id.* at 820.

196. *Id.*

197. *Id.* at 820-21.

198. *Id.* at 821.

199. *Id.* at 822.

200. *Id.*



The court of appeals affirmed the trial court's grant of summary judgment and held that the trial court did not abuse its discretion in striking Austin's affidavit.<sup>201</sup> Before his summary judgment motion, George had served May with interrogatories, requesting that May identify the "names and addresses of everyone who has relevant information."<sup>202</sup> May did not disclose Austin in his response and did not seasonably supplement his interrogatory answers as required by Trial Rule 26(E)(1)(a).<sup>203</sup> The court observed that, if a party fails to supplement discovery responses, the trial court has discretion to exclude the evidence.<sup>204</sup> The court held that it could not conclude that the trial court had abused its discretion in striking Austin's affidavit and therefore affirmed the trial court's decision.<sup>205</sup>

### *J. Summary Judgment*

1. *Specific Designations of Evidence Required.*—In *Duncan v. M&M Auto Service, Inc.*,<sup>206</sup> Richard Duncan appealed the trial court's grant of summary judgment in favor of M&M Auto Service in connection with Duncan's claim that he was injured as a result of M&M's negligently installing a compressed natural gas system in Duncan's van.<sup>207</sup>

Duncan was employed by the Southwestern Indiana Regional Council on Aging, which owned a van equipped to run on natural gas.<sup>208</sup> M&M had installed the compressed natural gas system using a fuel conversion kit.<sup>209</sup> While Duncan was refilling the natural gas tanks on the van, gas escaped and caused an explosion, injuring Duncan.<sup>210</sup> Duncan sued M&M alleging that it negligently installed and maintained the compressed natural gas system.<sup>211</sup> M&M filed a motion for summary judgment that the trial court granted.<sup>212</sup>

On appeal, Duncan argued inter alia that M&M's designation of evidence in support of its summary judgment motion was not sufficiently specific.<sup>213</sup> The court agreed with Duncan that Trial Rule 56(C) requires a party to "designate an affidavit either by providing specific page numbers and paragraph citations, or by specifically referring to the substantive assertions relied on. In other words,

---

201. *Id.* at 825-26.

202. *Id.* at 825.

203. *Id.*

204. *Id.* (citing *Dennerline v. Atterholt*, 886 N.E.2d 582, 592 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1230 (Ind. 2008)).

205. *Id.* at 825-26.

206. 898 N.E.2d 338 (Ind. Ct. App. 2008).

207. *Id.* at 340.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 341.

212. *Id.*

213. *Id.*

designating evidentiary materials in their entirety fails to meet the specificity requirement.”<sup>214</sup> The court then noted that many of the factual assertions in M&M’s summary judgment brief have no citation to the designation of evidence and that other designations refer to a M&M employee’s affidavit as a whole.<sup>215</sup> As to M&M’s failure to cite to designated materials, the court declined to search through the designated material on M&M’s behalf.<sup>216</sup> But the court concluded that references to the employee’s entire affidavit were permissible because the affidavit was only three pages with ten numbered paragraphs, all of which was relevant to issues on summary judgment.<sup>217</sup>

2. *Summary Judgment Affidavits.*—In *Hayes v. Trustees of Indiana University*,<sup>218</sup> Gloria Hayes appealed the trial court’s summary judgment order for the Trustees of Indiana University, and the court of appeals affirmed.<sup>219</sup>

The University employed Hayes in various capacities from June 1967 through March 2004.<sup>220</sup> On March 12, 2004, the University notified Hayes that her position had been eliminated, effective June 30, 2004, due to a reduction in force.<sup>221</sup> Hayes filed a complaint against the University, alleging inter alia that the University had breached an employment contract with her.<sup>222</sup> The University moved for summary judgment, arguing that Hayes’s claim relied upon the University’s employment manual, which cannot form the basis of a breach of contract action.<sup>223</sup> With her response, Hayes designated only her affidavit.<sup>224</sup> The University moved to strike portions of Hayes’ affidavit.<sup>225</sup> The trial court granted the University’s motion to strike and motion for summary judgment.<sup>226</sup>

Hayes argued on appeal that the trial court erred in striking portions of her affidavit.<sup>227</sup> The court of appeals began its analysis by noting that the decision to admit or exclude evidence rests within the trial court’s discretion and that summary judgment affidavits are governed by Trial Rule 56(E), which requires that affidavits be made on personal knowledge, set forth facts as would be admissible in evidence and “show affirmatively that the affiant is competent to testify to the matters stated therein.”<sup>228</sup> Further, the court noted that it “should

---

214. *Id.* (quoting *Boczar v. Reuben*, 742 N.E.2d 1010, 1016-17 (Ind. Ct. App. 2001) (citations and quotations omitted)).

215. *Id.*

216. *Id.* at 342.

217. *Id.* at 341-42.

218. 902 N.E.2d 303 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 551 (Ind. 2009).

219. *Id.* at 304.

220. *Id.* at 304-06.

221. *Id.* at 306.

222. *Id.*

223. *Id.* at 306-07.

224. *Id.* at 307.

225. *Id.*

226. *Id.*

227. *Id.* at 309.

228. *Id.* (quoting *City of Gary v. McCrady*, 851 N.E.2d 359, 363 (Ind. Ct. App. 2006))



disregard inadmissible information contained in supporting or opposing affidavits.”<sup>229</sup>

Turning to Hayes’ affidavit, the court first determined that the trial court did not abuse its discretion in striking a paragraph based on Hayes’ failure to establish foundation for having personal knowledge regarding other employees’ seniority and compensation.<sup>230</sup> The court next agreed with the trial court that it was proper to strike portions of Hayes’ affidavit that conflicted with her sworn deposition testimony.<sup>231</sup> Finally, the court concluded that it was not an abuse of discretion for the trial court to strike portions of Hayes’ affidavit that relied upon or referenced documents that were not attached to the affidavit and had not been otherwise authenticated.<sup>232</sup>

3. *Sham Affidavit*.—In *Crawfordsville Square, LLC v. Monroe Guaranty Insurance Co.*,<sup>233</sup> Crawfordsville Square LLC (CS) appealed the trial court’s grant of partial summary judgment in favor of Monroe Guaranty Insurance Co. (“Monroe”). The court of appeals affirmed the trial court.<sup>234</sup>

CS, which operated a shopping mall in Crawfordsville, Indiana, contracted to purchase a parcel of land adjacent to its mall.<sup>235</sup> Kleinmaier, a member of CS, sent a letter to the agent of the seller, insisting on the cleanup of environmental contamination at the parcel.<sup>236</sup> Following closing, CS sought to add the parcel to its existing commercial general liability insurance policy through Monroe; however, CS did not advise Monroe regarding the contamination—or suspected contamination—at the site.<sup>237</sup>

Several years later, the Indiana Department of Environmental Management (IDEM) sent CS a notice of contamination.<sup>238</sup> Monroe denied coverage and denied that it owed a duty to defend CS, and CS filed an action seeking a declaration that Monroe had a duty to defend.<sup>239</sup> The trial court granted Monroe’s motion for partial summary judgment and CS appealed.<sup>240</sup>

The court first noted that the “known loss doctrine” will bar coverage if the “insured has actual knowledge that a loss has occurred, is occurring, or is substantially certain to occur on or before the effective date of the policy.”<sup>241</sup> CS

---

(citations omitted)).

229. *Id.*

230. *Id.* at 310-11.

231. *Id.*

232. *Id.* at 311.

233. 906 N.E.2d 934 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 552 (Ind. 2009).

234. *Id.* at 935.

235. *Id.* at 936.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 936-37.

240. *Id.* at 937.

241. *Id.* at 938 (quoting *Gen. Housewares Corp. v. Nat’l Sur. Corp.*, 741 N.E.2d 408, 413-14 (Ind. Ct. App. 2000)).

argued that a fact issue existed because there was a conflict between Kleinmaier's earlier letter concerning environmental clean-up expenses and his later deposition testimony where he denied having actual knowledge of the contamination when he wrote the letter.<sup>242</sup> The court analogized CS's efforts to a sham affidavit situation, in which courts routinely reject affidavits conflicting with prior deposition testimony in an effort to create a fact issue sufficient to avoid summary judgment.<sup>243</sup> Although the factual situation was somewhat different here, the court concluded that the same concept should apply.<sup>244</sup> Accordingly, the court concluded that Kleinmaier's subsequent deposition testimony should be disregarded and therefore no fact issue existed.<sup>245</sup>

### *K. Relief from Judgment*

In *Heartland Resources, Inc. v. Bedel*,<sup>246</sup> Heartland Resources, Inc. ("Heartland") appealed the trial court's entry of default judgment against it and in favor of Ambrose and Catherine Bedel.<sup>247</sup> Heartland and the Bedels entered into a contract whereby the Bedels agreed to invest in Heartland's "gas well ventures" in Louisiana.<sup>248</sup> The contract contained a forum selection clause, requiring that any disputes be resolved in Warren County, Kentucky.<sup>249</sup>

On February 12, 2007, the Bedels filed suit against Heartland, alleging securities fraud, common law fraud, constructive fraud, breach of fiduciary duty, and identity theft.<sup>250</sup> Heartland failed to file a timely answer, and, on March 29, 2007, the trial court entered default judgment against Heartland.<sup>251</sup> Nevertheless, shortly after entering default, the trial court granted Heartland an "extension of time" in which to respond to the Bedels' complaint.<sup>252</sup> On May 25, 2007, Heartland moved to dismiss the complaint for lack of personal jurisdiction based on the forum selection clause.<sup>253</sup> The trial court denied this motion on February 14, 2008.<sup>254</sup> On February 29, 2008, Heartland filed a motion to set aside the default judgment pursuant to Trial Rule 60(B) but did not argue that the trial court lacked personal jurisdiction by virtue of the forum selection clause.<sup>255</sup> The

---

242. *Id.*

243. *Id.* at 939.

244. *Id.*

245. *Id.*

246. 903 N.E.2d 1004 (Ind. Ct. App. 2009).

247. *Id.* at 1005.

248. *Id.* at 1006.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*



trial court denied this motion as well, and Heartland appealed.<sup>256</sup>

The court of appeals first noted that the trial court correctly denied Heartland's motion to dismiss because, because of the trial court's prior entry of default judgment, Heartland's motion to dismiss the complaint was a nullity.<sup>257</sup> The court also concluded that the trial court correctly denied Heartland's Rule 60(B) motion to set aside the default judgment because Heartland only argued that "mistake, surprise, or excusable neglect had caused it to not properly respond to the complaint."<sup>258</sup> But as the court noted, in addition to showing excusable neglect, a Rule 60(B) movant must also demonstrate the existence of a meritorious defense.<sup>259</sup> In other words, the movant must demonstrate that it has a defense that would lead to a different result on the merits.<sup>260</sup> The court also concluded that, because Heartland omitted its personal jurisdiction argument based on the forum selection clause, it had waived its personal jurisdiction challenge and failed to demonstrate the existence of a meritorious defense.<sup>261</sup>

#### *L. Preliminary Injunction*

In *Hay v. Baumgartner*,<sup>262</sup> Hay appealed the trial court's award of attorney's fees to the Baumgartners pursuant to Trial Rule 65(C).<sup>263</sup> The Indiana Court of Appeals affirmed in part and reversed in part.<sup>264</sup>

Steven Hay and Ronald and Gloria Baumgartner own adjoining lots, the previous owners of which apparently shared a driveway.<sup>265</sup> When the Baumgartners built a new home and garage on their property, they set about to remove the old shared driveway.<sup>266</sup> Hay filed a motion for temporary restraining order and preliminary injunction, seeking to stop the Baumgartners from removing the driveway based on his claim that he had an irrevocable license to use it.<sup>267</sup> The trial court entered a temporary restraining order and scheduled a preliminary injunction hearing; however, on the day before the hearing, the parties stipulated to converting the temporary restraining order into a preliminary injunction.<sup>268</sup> Following a bench trial on the merits, the trial court denied Hay's request for a permanent injunction.<sup>269</sup> Hay appealed and obtained an order

---

256. *Id.*

257. *Id.*

258. *Id.* at 1007.

259. *Id.*

260. *Id.*

261. *Id.*

262. 903 N.E.2d 1044 (Ind. Ct. App. 2009).

263. *Id.* at 1046.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

reinstating the preliminary injunction while the appeal was pending.<sup>270</sup> But the court of appeals concluded that Hay only had a revocable license.<sup>271</sup> Upon remand, the Baumgartners filed a motion to assess damages, and the trial court awarded \$14,257.96, of which \$13,488.19 represented the Baumgartners' attorney's fees.<sup>272</sup> Hay appealed.<sup>273</sup>

The court of appeals began its analysis by observing that a party is entitled to recover attorney's fees where a temporary restraining order or preliminary injunction is dissolved and not replaced by a permanent injunction.<sup>274</sup> The court further noted that a party's right to recover fees under Trial Rule 65(C) "arises when he proves that it has been finally or ultimately determined that injunctive relief was not warranted on the merits."<sup>275</sup> Hay conceded that the Baumgartners were entitled to recover fees incurred in litigating the temporary restraining order, but he argued that they should not recover fees incurred litigating the preliminary injunction because they stipulated to its entry.<sup>276</sup> The court agreed, holding that principles of judicial estoppel prevented the Baumgartners from stipulating to the entry of the preliminary injunction and then attempting to recover fees based on a claim that the injunction was wrongfully entered.<sup>277</sup> Accordingly, the court affirmed the trial court's award of attorney's fees incurred in litigating the temporary restraining order and during the time the preliminary injunction had been reinstated following the trial on the merits; however, the court reversed the trial court's award of fees the Baumgartners incurred in relation to the stipulated preliminary injunction.<sup>278</sup>

### *M. Attorney Fees and Costs*

In *Indiana High School Athletic Ass'n v. Schafer*,<sup>279</sup> the Indiana High School Athletic Association (IHSAA) appealed the trial court's award of fees in favor of Schafer.<sup>280</sup> After considering the issues, the Indiana Court of Appeals remanded for further action by the trial court.<sup>281</sup>

In a prior action, Schafer successfully challenged the IHSAA's application of its athletic eligibility rules.<sup>282</sup> Schafer, who played for the Andrean High

---

270. *Id.*

271. *Id.* (citing *Hay v. Baumgartner*, 870 N.E.2d 568 (Ind. Ct. App. 2007)).

272. *Id.*

273. *Id.* at 1047.

274. *Id.* (citing *Bigley v. MSD of Wayne Twp. Schs.*, 881 N.E.2d 77, 81 (Ind. Ct. App. 2008)).

275. *Id.* (quoting *Nat'l Sanitary Supply Co. v. Wright*, 644 N.E.2d 903, 906 (Ind. Ct. App. 1994)).

276. *Id.* at 1048.

277. *Id.* at 1049.

278. *Id.* at 1049-50.

279. 913 N.E.2d 789 (Ind. Ct. App. 2009).

280. *Id.* at 791.

281. *Id.*

282. *Id.* at 792-93.



School basketball team, had to withdraw from school due to chronic illness before the end of the basketball season during his junior year.<sup>283</sup> Andrean High School permitted him to repeat his junior year, but the IHSAA refused Schafer's request that his abbreviated junior season not count against his athletic eligibility.<sup>284</sup> Schafer filed an action seeking to enjoin the IHSAA from ruling him ineligible or penalizing Andrean High School.<sup>285</sup> The trial court concluded that the IHSAA eligibility rules at issue were "overly broad, overly inclusive, arbitrary, and capricious and do not bear a fair relationship to the intended purpose of the rules" and, therefore, enjoined the IHSAA from ruling Schafer ineligible.<sup>286</sup> Schafer then brought an action to recover attorney's fees, and the trial court granted his request, concluding that the IHSAA continued to litigate "a defense that was frivolous, unreasonable, and groundless."<sup>287</sup>

The court of appeals first examined the statutory basis for the trial court's decision, Indiana Code section 34-52-1-1.<sup>288</sup> The court noted that a claim or defense is "frivolous" if:

[I]t is taken primarily for the purpose of harassment, if the attorney is unable to make a good faith and rational argument on the merits of the action, or if the lawyer is unable to support the action taken by a good faith and rational argument for an extension, modification, or reversal of existing law.<sup>289</sup>

The court next observed that a claim or defense can be considered "unreasonable" if: "based on the totality of the circumstances, including the law and the facts known at the time of filing, no reasonable attorney would consider that the claim or defense was worthy of litigation."<sup>290</sup> The court further explained that a "groundless" claim or defense exists where "no facts support the legal claim presented by the losing party."<sup>291</sup> Finally, the court observed that a trial court need not find an improper motive to award fees under section 34-52-1-1; rather, the court need only find a lack of good faith and a rational argument to support the claim.<sup>292</sup>

But the court concluded that the trial court's written findings of fact were insufficient to support an award of fees.<sup>293</sup> Specifically, the court found the trial court's conclusory assertions that the IHSAA continued to litigate a "frivolous,

---

283. *Id.* at 792.

284. *Id.*

285. *Id.*

286. *Id.* at 792-93.

287. *Id.* at 793.

288. *Id.*

289. *Id.* at 794 (citing *Kahn v. Cundiff*, 533 N.E.2d 164, 170 (Ind. Ct. App.), *aff'd* 543 N.E.2d 627 (Ind. 1989)).

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* at 795-96.

unreasonable and groundless” defense unhelpful because the trial court did not explain how or why the IHSAA’s defense met this description.<sup>294</sup> The court also concluded that the trial court’s characterization of the IHSAA rules in question as “arbitrary and capricious” was insufficient because it related to conduct preceding the lawsuit, not the conduct of the litigation itself.<sup>295</sup> Accordingly, the court remanded the matter to the trial court with instructions to explain the basis for its conclusion that Schafer was entitled to an award of fees.<sup>296</sup>

### III. AMENDMENTS TO INDIANA RULES OF TRIAL PROCEDURE

By order dated January 6, 2009, the Indiana Supreme Court amended Indiana Rule of Trial Procedure 59 by adding the following:

(K) Orders regarding services, programs, or placement of children alleged to be delinquents or alleged to be in need of services. No motion to correct error is allowed concerning orders or decrees issued pursuant to Indiana Code sections 31-34-4-7(e), 31-34-19-6.1(e), 31-37-5-8(f), or 31-37-18-9(b). Appeals of such orders and decrees shall proceed as prescribed by Indiana Appellate Rule 14.1.<sup>297</sup>

By order dated February 4, 2009, the Indiana Supreme Court amended Indiana Rule of Trial Procedure 60.5 such that it now reads as follows:

#### **Rule 60.5. Mandate of funds**

**(A) Scope of mandate.** Courts shall limit their requests for funds to those which are reasonably necessary for the operation of the court or court-related functions. Mandate will not lie for extravagant, arbitrary or unwarranted expenditures nor for personal expenditures (e.g., personal telephone bills, bar association memberships, disciplinary fees). Prior to issuing the order, the court shall meet with the mandated party to demonstrate the need for said funds. At any time in the process, the dispute may be submitted to mediation by agreement of the parties or by order of the Supreme Court or the special judge.

**(B) Procedure.** Whenever a court, except the Supreme Court or the Court of Appeals, desires to order either a municipality, a political subdivision of the state, or an officer of either to appropriate or to pay unappropriated funds for the operation of the court or court-related functions, such court shall issue and cause to be served upon such municipality, political subdivision or officer an order to show cause why such appropriation or payment should not be made. Such order to show cause shall be captioned “Order for Mandate of Funds”. The matter

---

294. *Id.* at 796.

295. *Id.* at 795-96.

296. *Id.* at 798.

297. IND. TRIAL R. 59(k).



shall be set for trial on the merits of such order to show cause unless the legislative body, the chief executive officer or the affected officer files a waiver in writing of such a trial and agrees to make such appropriation or payment. The trial shall be without a jury, before a special judge of the court that made the order. There shall be no change of venue from the county or from the special judge appointed by the Supreme Court. The court shall promptly notify the Supreme Court of the entry of such order to show cause and the Supreme Court shall then appoint as special judge an attorney who is not a current or former regular judge and who does not reside nor regularly practice law in the county issuing the Order of Mandate of Funds or in any county contiguous thereto. If the appointed judge fails to qualify within seven [7] days after he has received notice of his appointment, the Supreme Court shall follow the same procedure until an appointed judge does properly qualify. Unless expressly waived by the respondent in writing within thirty (30) days after the entering of the trial judge's decree, a decree or order mandating the payment of funds for the operation of the court or court-related functions shall be automatically reviewed by the Supreme Court. Promptly on expiration of such thirty (30) day period, the trial judge shall certify such decree together with either a stipulation of facts or an electronic transcription of the evidence to the Supreme Court. No motion to correct error nor notice of appeal shall be filed. No mandate order for appropriation or payment of funds made by any court other than the Supreme Court or Court of Appeals *shall direct that attorney fees be paid at a rate greater than the reasonable and customary hourly rate for an attorney in the county. No mandate order shall be effective unless it is entered after trial as herein provided and until the order has been reviewed by the Supreme Court or such review is expressly waived as herein provided.*<sup>298</sup>

By order dated September 15 2009, the Indiana Supreme Court amended a number of Rules of Trial Procedure, including Rules 3.1, 43 and 79.

The Court amended Rule 3.1(A) to add the following language:

(9) In a proceeding involving a mental health commitment, except 72 hour emergency detentions, the initiating party shall provide the full name of the person with respect to whom commitment is sought and the person's state of residence. In addition, the initiating party shall provide at least one of the following identifiers for the person:

- (a) Date of birth;
- (b) Social Security Number;
- (c) Driver's license number with state of issue and date of expiration;
- (d) Department of Correction number;
- (e) State ID number with state of issue and date of expiration; or

---

298. IND. TRIAL R. 60.5.

(f) FBI number.

The Court amended Rule 43 to add the following language:

**(E) Public Access.** Information filed or introduced in court proceedings is confidential to the extent provided by statutes, rules of court and Indiana Administrative Rule 9(G).

The Court amended Rule 79 such that it now reads as follows:

**Rule 79. Special judge selection: circuit, superior, and probate courts**

**(A) Application.** When the appointment of a special judge is required under Trial Rule 76, the provisions of this rule constitute the exclusive manner for the selection of special judges in circuit, superior, and probate courts in all civil and juvenile proceedings. Trial Rule 79.1 constitutes the exclusive manner for the selection of special judges in all actions in city, town, and the Marion county small claims courts.

**(B) Duty to notify court.** It shall be the duty of the parties to advise the court promptly of an application or motion for change of judge.

**(C) Disqualification or recusal of judge.** A judge shall disqualify and recuse whenever the judge, the judge's spouse, a person within the third degree of relationship to either of them, the spouse of such a person, or a person residing in the judge's household:

- (1) is a party to the proceeding, or an officer, director or trustee of a party;
- (2) is acting as a lawyer in the proceeding;
- (3) is known by the judge to have an interest that could be substantially affected by the proceeding; or
- (4) is associated with the pending litigation in such fashion as to require disqualification under the *Code of Judicial Conduct* or otherwise.

Upon disqualification or recusal under this section, a special judge shall be selected in accordance with Sections (D), (E), and (H) of this rule.

**(H) Selection under local rule.** In the event a special judge does not accept the case under Sections (D), (E) or (F), or a judge disqualifies and recuses under Section (C), the appointment of an eligible special judge shall be made pursuant to a local rule approved by the Indiana Supreme Court which provides for the following:

- (1) appointment of persons eligible under Section J who: a) are within the administrative district as set forth in Administrative Rule 3(A), or b) are from a contiguous county, and have agreed to serve as a special judge in the court where the case is pending;<sup>299</sup>

---

299. IND. TRIAL R. 79.



# INDIANA CONSTITUTIONAL DEVELOPMENTS: VITALITY FOR THE EX POST FACTO CLAUSE, BUT NOT THE EDUCATION CLAUSE

JON LARAMORE\*

## I. DECISIONS RELATING TO INDIVIDUAL RIGHTS

During the survey period, Indiana's appellate courts decided numerous cases applying provisions of the Indiana Constitution that govern individual rights. Several of these cases applied the ex post facto clause and involved restrictions on sex offenders.<sup>1</sup> Although federal and state ex post facto provisions are identical, Indiana's courts interpreted the ex post facto provision in the state constitution as more protective of individual rights than the federal standard.<sup>2</sup> In a case applying article 8, the Indiana Supreme Court held that the Indiana Constitution provides no standard of quality that must be met by Indiana's constitutionally mandated system of common schools, dismissing a challenge to the state's school funding formula.<sup>3</sup> The Indiana Court of Appeals rejected a challenge to a statutory ban on switchblade knives, finding that the ban did not violate the right to bear arms in the Indiana Constitution.<sup>4</sup> Indiana's courts also continued to refine unique Indiana constitutional analyses applying to "multiple punishments" double jeopardy and to search and seizure.<sup>5</sup>

### A. *Ex Post Facto Clause—Article 1, Section 24*

The Indiana Supreme Court and Indiana Court of Appeals decided several cases involving the ex post facto clause in article 1, section 24 and the Sex and Violent Offender Registry (the "Registry"). Changes to the Registry and restrictions on those listed on the Registry applied to persons convicted before the State enacted the changes, implicating the ex post facto clause.

Although the Indiana Supreme Court applied state constitutional language nearly identical to the words of the U.S. Constitution, its analysis and outcome differed. The restrictions the Indiana Supreme Court found to violate the Indiana Constitution are the type that have been held by the U.S. Supreme Court not to violate the Federal Constitution.<sup>6</sup> These decisions represent another area in

---

\* Partner, Baker & Daniels LLP, Indianapolis. Former legal counsel to Indiana Governors Frank O'Bannon and Joseph E. Kernan and former adjunct professor, Indiana University School of Law—Indianapolis. Daniel E. Pulliam provided research assistance used in this Article.

1. *See infra* Part I.A.

2. *See infra* text accompanying notes 6-7.

3. *See infra* Part I.B.

4. *See infra* Part I.D.

5. *See infra* Part I.H.

6. *Compare* *Wallace v. State*, 905 N.E.2d 371, 378, 384 (Ind. 2009) (holding a sex offender registry violated the ex post facto clause of the Indiana Constitution as applied to a convicted child molester), *reh'g denied*, No. 49S02-0803-CR-138, 2009 Ind. LEIS (Ind. Aug. 20, 2009), *with* *Smith v. Doe*, 538 U.S. 84, 105 (2003) (holding that a similar Alaska statute did not violate the Ex

which Indiana provides broader constitutional protections than the Federal Constitution. The Indiana Supreme Court decided two of these cases on the same day, *Wallace v. State*<sup>7</sup> and *Jensen v. State*.<sup>8</sup>

The defendant in *Wallace* pled guilty to child molestation as a Class C felony in 1989 and received a suspended five-year sentence.<sup>9</sup> He completed his probation in 1992, two years before the legislature passed the Sex Offender Registration Act (the "Act").<sup>10</sup> In 2001, the legislature amended the Act to require all offenders ever convicted of certain acts to register as sex offenders regardless of the date of their conviction.<sup>11</sup> Wallace refused to register, and he was charged with and convicted of failing to register as a sex offender, a Class D felony.<sup>12</sup>

As first enacted in 1994, the Registry required both registration and notification.<sup>13</sup> Persons convicted of certain sex offenses were required to notify law enforcement of their whereabouts and that information was disseminated to the public.<sup>14</sup> As initially enacted, persons convicted of eight enumerated crimes were required to register, and the Registry was produced in paper form twice annually.<sup>15</sup> Since its initial enactment, the legislature amended the Act several times to add crimes requiring registration (including violent offenses such as murder and criminal confinement); to increase the periods of time names appear on the Registry; to increase the amount of information that offenders must provide to local law enforcement as part of registration (including email addresses and certain website user names); to require those on the Registry to consent to random searches of their personal computers; and to place information about those on the Registry on the Internet.<sup>16</sup> Another amendment makes it a felony for certain persons who are required to register to live within 1000 feet of a school, youth program center, or public park.<sup>17</sup> Wallace's ex post facto claim was straightforward—he committed his crime, was convicted, and completed his sentence before the Act became law, so the Act's application to him was unconstitutional.<sup>18</sup>

As the Indiana Supreme Court held in *Wallace*, it had never decided whether analysis under the ex post facto clause of the Indiana Constitution was the same

---

Post Facto Clause of the U.S. Constitution).

7. 905 N.E.2d 371 (Ind. 2009).
8. 905 N.E.2d 384 (Ind. 2009).
9. *Wallace*, 905 N.E.2d at 373.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 374-75.
14. Pub. L. No. 11-1994, § 7 (codified at IND. CODE §§ 5-2-12-1 to -13 (2005)), *repealed by* Pub. L. No. 140-2006, § 41 and Pub. L. No. 173-2006, § 55.
15. *Wallace*, 905 N.E.2d at 375.
16. *Id.* at 375-76.
17. IND. CODE § 35-42-4-11(c)(1)(A)-(C) (2008).
18. *Wallace*, 905 N.E.2d at 377.



as analysis of the same clause in the U.S. Constitution.<sup>19</sup> The court also stated that its analysis of Indiana's constitutional provisions has frequently departed from federal constitutional analysis even when the state and federal provisions are similarly worded.<sup>20</sup>

Without extensive analysis, however, the court announced that it would apply the Indiana Constitution's ex post facto clause by using the "intent-effects" test in *Smith v. Doe*,<sup>21</sup> a U.S. Supreme Court case.<sup>22</sup> Under the intent-effects test "a court first determines whether the legislature meant the statute to establish civil proceedings. If the intention of the legislature was to impose punishment, then that ends the inquiry . . . ."<sup>23</sup> Describing the "effects" prong of the test, the court stated, "[i]f, however the court concludes that the legislature intended a non-punitive regulatory scheme, then the court must further examine whether the statutory scheme is so punitive in effect as to negate that intention thereby transforming what had been intended as a civil regulatory scheme into a criminal penalty."<sup>24</sup>

In *Wallace*, however, the court skipped the "intent" prong of the test, noting that its determination that the Registry was unconstitutional under the "effects" prong as applied to Wallace made analysis of the "intent" prong unnecessary.<sup>25</sup> The court recited the seven-factor test for determining "effects" under *Smith*:

[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.<sup>26</sup>

The court then analyzed each factor as it applied to Wallace.<sup>27</sup> As to the first factor, the court reasoned that the Registry "imposes significant affirmative obligations and a severe stigma on every person to whom it applies,"<sup>28</sup> including requirements that those on the Registry always carry personal identification, that they permit random in-home visits, and that they give notice of their whereabouts to law enforcement, often for their entire lifetimes.<sup>29</sup> As to the second factor, the

---

19. *Id.* (citation omitted).

20. *Id.* at 377-78 (citing *State v. Gerschoffer*, 763 N.E.2d 960, 965 (Ind. 2002)).

21. 538 U.S. 84 (2003).

22. *Wallace*, 905 N.E.2d at 378.

23. *Id.* (citing *Smith*, 538 U.S. at 105-06).

24. *Id.*

25. *Id.* at 379.

26. *Id.* (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

27. *Id.*

28. *Id.*

29. *Id.* at 379-80.

court likened registration to “the punishment of shaming” and to the conditions of supervised probation or parole.<sup>30</sup> As to the third factor, the court concluded that most offenses requiring registration had a scienter element.<sup>31</sup>

Under the fourth factor, the court concluded that the Registry has a substantial deterrent effect and promotes community condemnation of the offender, both “traditional aims of punishment.”<sup>32</sup> As to the fifth factor, the court concluded that only a conviction—not any other finding that the charged conduct occurred or that the offender is a potential recidivist—triggers registration.<sup>33</sup> As to the sixth factor, the court reinterpreted the question to be “whether the Act advances a legitimate, regulatory purpose” and answered the question affirmatively because the legislature designed the Act in part to notify the community about sex offenders to allow citizens to protect themselves.<sup>34</sup>

The court spent the most time analyzing the seventh factor, “whether [the Act] appears excessive in relation to the alternative purpose assigned,” and noted that some courts assign this factor the greatest weight.<sup>35</sup> The court noted that the Registry is a means to protect the public from sex offenders, but it also noted that being on the Registry is not tied to any finding of dangerousness.<sup>36</sup> The court found it “significant” that no method exists for offenders to show a lack of dangerousness and be removed from the Registry, “even on the clearest proof of rehabilitation.”<sup>37</sup> The court found, on balance, that this factor tilted in favor of treating the Registry as punitive.<sup>38</sup>

The court summarized that only one of the seven factors pointed clearly in favor of viewing the Registry as non-punitive, while the remaining factors all pointed the other direction.<sup>39</sup> The court concluded that the Registry is punitive in effect under the *Smith* test, and thus could not constitutionally be applied to Wallace, who had completed his sentence before the Registry was established.<sup>40</sup> Thus, the Registry violated the ex post facto clause as applied to Wallace.<sup>41</sup>

In *Jensen*, by contrast, the court’s analysis led to the opposite conclusion because Jensen had committed his offense after the legislature created the Registry.<sup>42</sup> He challenged only the expansion of the Registry that required him to register for the rest of his life rather than just for ten years after his term of

---

30. *Id.* at 380 (citing *Doe v. State*, 189 P.3d 999, 1012 (Alaska 2008)).

31. *Id.* at 381.

32. *Id.* at 381-82.

33. *Id.* at 382.

34. *Id.* at 383.

35. *Id.* (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963)).

36. *Id.*

37. *Id.* at 384.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Jensen v. State*, 905 N.E.2d 384, 391-92 (Ind. 2009).



probation expired.<sup>43</sup> The court split 3-2 in Jensen's case.<sup>44</sup>

Jensen pled guilty in 2000 of vicarious sexual gratification and child molesting and the court sentenced him to three years in prison and three more on probation.<sup>45</sup> He was released from probation in 2004, but the Registry statute in effect when he committed his crime required him to continue to register for ten years.<sup>46</sup> In 2006, the legislature amended the Registry law to require a person convicted of the offenses Jensen committed to register for the person's entire lifetime.<sup>47</sup> Relying in part on the ex post facto clause, Jensen sought relief from lifetime registration in a trial court, but the trial court held that he was required to register for his lifetime.<sup>48</sup>

The Indiana Supreme Court analyzed the same seven factors from *Smith v. Doe* to determine whether the application of the Registry to Jensen violated the ex post facto clause, but the court looked only at the additional burden created by lifetime, as opposed to ten-year, registration.<sup>49</sup> As to the first factor, the court concluded that the Registry imposed significant affirmative obligations and a severe stigma, but that the additional burden of lifetime registration produced only slight additional negative impact.<sup>50</sup> As to the second factor, the additional period of registration – including a new requirement that Jensen's photo appear on the Internet with a large label "Sex Predator"—the court deemed punitive.<sup>51</sup> As to the third factor, the court found it to fall slightly on the side of punitive.<sup>52</sup>

As to the fourth, fifth, and sixth factors, the court concluded that the effect of lifetime registration was no different from the effect of ten-year registration; so, the court deemed each of these factors non-punitive as applied to Jensen.<sup>53</sup> Regarding the seventh factor, the court also determined that the additional years of registration had little additional effect on Jensen: "The 'broad and sweeping' disclosure requirements were in place and applied to Jensen at the time of his guilty plea in January 2000. Nothing in that regard was changed by the 2006 amendments."<sup>54</sup>

The court concluded that, taken together, the seven factors did not show that the 2006 amendments were punitive as applied to Jensen, so there was no ex post facto clause violation.<sup>55</sup> The court also rejected a separate argument that Jensen's guilty plea could not have been knowing and voluntary because he could

---

43. *Id.* at 389-90.

44. *Id.* at 396.

45. *Id.* at 388-89.

46. *Id.* at 389.

47. *Id.*

48. *Id.*

49. *Id.* at 391-92.

50. *Id.*

51. *Id.* at 392.

52. *Id.* at 392-93.

53. *Id.* at 393.

54. *Id.* at 394.

55. *Id.*

not be aware of the full consequences of his plea (because some of those consequences did not exist until six years later, when the Registry law was amended).<sup>56</sup> The court found that this claim required factual inquiry best provided through post-conviction proceedings.<sup>57</sup>

Justice Sullivan concurred in the result, reasoning that Jensen's challenge was premature.<sup>58</sup> Because Jensen was still covered by the ten-year registration requirement that existed when he committed his crime, and the Registry statute was subject to additional amendments (which could include repeal of the provisions he was challenging), Justice Sullivan suggested that Jensen's challenge would not be ripe until the initial ten-year registration period had expired.<sup>59</sup>

Justice Boehm dissented, joined by Justice Dickson.<sup>60</sup> He concluded that "the enhanced registration requirements enacted in 2006 constitute an additional punishment that violates the Ex Post Facto Clause as applied to Jensen."<sup>61</sup> He noted that *Wallace* concluded that the registration requirement is punitive in effect, and "if the registration requirement is punitive, extending its period is no less additional punishment than extending a period of incarceration."<sup>62</sup> He also criticized the majority's evaluation of several of the *Smith* factors.<sup>63</sup>

The Indiana Supreme Court also applied the ex post facto clause in *State v. Pollard*,<sup>64</sup> finding other aspects of the Registry violated the clause. Pollard was convicted of a sex-related offense in 1997.<sup>65</sup> In 2006, the legislature amended the Registry law to forbid persons convicted of certain sex-related crimes from knowingly or intentionally residing within 1000 feet of school property, a youth program center, or a public park.<sup>66</sup> In 2007, Pollard was charged with violating this new provision because he did not move from the residence he owned and had lived in for many years, which was within 1000 feet of school property, a youth program center, or a public park.<sup>67</sup>

As in *Wallace*, the court could not determine whether the legislative intent of the residency restriction was to punish; so, it analyzed the effect of the provision under the seven-factor test in *Smith*.<sup>68</sup> On the first factor, the court found that the residency restriction created a significant and direct disability—requiring Pollard to move from the house he owned and had

---

56. *Id.* at 395.

57. *Id.*

58. *Id.*

59. *Id.* at 396 (Sullivan, J., concurring).

60. *Id.*

61. *Id.* at 396-97 (Boehm, J., dissenting).

62. *Id.* at 397.

63. *Id.* at 397-98.

64. 908 N.E.2d 1145 (Ind. 2009).

65. *Id.* at 1147.

66. *Id.*; IND. CODE § 35-42-4-11 (2008).

67. *Pollard*, 908 N.E.2d at 1148.

68. *Id.* at 1149.



previously lived in and possibly requiring him to move continuously as schools and parks were built.<sup>69</sup> On the second factor, the court found that the residency restriction was akin to a condition of probation and therefore punitive.<sup>70</sup> On the third factor, the court was unable to determine the role of scienter in Pollard's case because the record did not name his offense but found the statute's effects non punitive absent evidence to the contrary.<sup>71</sup> As to the fourth factor, the court found the residency restriction punitive because the legislature designed it to be a direct deterrent.<sup>72</sup> On the fifth factor, the court found the statute punitive because it attaches only to acts that are otherwise criminal.<sup>73</sup> On the sixth factor, the court found the statute non-punitive because it promotes public safety and is not designed solely to punish.<sup>74</sup> Finally, on the seventh factor, the court found that many offenses triggered the statutory restriction on residency with no consideration for the seriousness of the crime, the relation between victim and offender, or the risk of re-offending.<sup>75</sup> Therefore, the statute was excessive in relation to its non-punitive purpose of protecting children.<sup>76</sup>

On balance, the court found that most of the *Smith* factors required a determination that the residency restriction was punitive and therefore violated the ex post facto clause as to Pollard.<sup>77</sup> The decision was unanimous except for a one-sentence reservation by Justice Boehm regarding the majority's treatment of the third *Smith* factor.<sup>78</sup>

The Indiana Court of Appeals applied the ex post facto clause in two cases. In *Dowdell v. City of Jeffersonville*,<sup>79</sup> the court analyzed that city's ordinance prohibiting those on the Registry from entering public parks in the city. Dowdell committed, was convicted of, and finished his sentence for sexual battery before the ordinance was enacted.<sup>80</sup> He wanted to enter Jeffersonville parks to see his son play little league baseball.<sup>81</sup> He tried to use the ordinance's waiver provision, which permits exceptions for a "legitimate reason,"<sup>82</sup> but his requests were denied.<sup>83</sup> At the time of his request, no waivers ever had been granted under the

---

69. *Id.* at 1150.

70. *Id.* at 1151.

71. *Id.* at 1151-52.

72. *Id.* at 1152.

73. *Id.*

74. *Id.* at 1152-53.

75. *Id.* at 1153.

76. *Id.* at 1153.

77. *Id.* at 1153-54.

78. *Id.* at 1154 (Boehm, J., concurring) (stating his belief that "the absence of a scienter element for certain forms of child molesting is not significant in evaluating the punitive character of this statute").

79. 907 N.E.2d 559 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 552 (Ind. 2009).

80. *Id.* at 563.

81. *Id.* at 564.

82. *Id.* at 567.

83. *Id.*

ordinance.<sup>84</sup>

The court analyzed Dowdell's as-applied challenge using the *Wallace* standard.<sup>85</sup> Dowdell conceded that the ordinance had a non-punitive purpose, so the court went directly to the "effects" prong of the test.<sup>86</sup> The court found the first factor tilted in favor of punishment because the prohibition against entering parks was a "significant restraint," with violation punishable by prosecution.<sup>87</sup> Interestingly, the court also found that the waiver provision was itself a significant burden because of its detailed requirements and lack of meaningful standards.<sup>88</sup> As to the second factor, the court found that the banishment and shaming aspects of the ordinance were traditionally considered punishments.<sup>89</sup> On the third factor, the scienter requirement tilted toward punishment.<sup>90</sup>

Regarding the fourth factor, the court found that deterrence and retribution were goals of the ordinance, and those are traditional aims of punishment.<sup>91</sup> The fifth factor also tipped toward punishment because the park ban applied only to acts that were already criminal.<sup>92</sup> On the sixth factor, the ordinance had the non-punitive purpose of public protection.<sup>93</sup> As to the seventh factor, the court found that the restriction was excessive in relation to its non-punitive purpose because the state already had determined that Dowdell no longer had to register as a sex offender; thus, these additional restrictions were unnecessary to protect public safety.<sup>94</sup> Because the greatest number of factors led to the conclusion that the effect of the ordinance was punitive, the court concluded that the ordinance violated the ex post facto clause as applied to Dowdell.<sup>95</sup>

Judge Crone dissented.<sup>96</sup> He weighed several of the factors differently than the majority, including the first, second, fourth, and seventh.<sup>97</sup> He also concluded that the waiver provision in the ordinance gave some potential relief from the ordinance's restrictions.<sup>98</sup> His analysis of the factors led him to conclude that the

---

84. *Id.* at 567.

85. *Id.* at 565.

86. *Id.* at 565-66.

87. *Id.* at 566-68.

88. *Id.* at 567.

89. *Id.* at 568-69.

90. *Id.* at 569.

91. *Id.* at 569-70.

92. *Id.* at 570.

93. *Id.*

94. *Id.* at 570-71.

95. *Id.* at 571.

96. *Id.*

97. *Id.* at 572-73 (Crone, J., dissenting) (arguing that the ordinance is not an affirmative disability or restraint because it does not require any action by the offender or create severe stigma; that it is not akin to banishment because it precludes access only to a subset of the community; that its deterrent effect does not necessarily make it promote traditional aims of punishment; and that it is not excessive because its effect is not as sweeping as the restriction in *Wallace*).

98. *Id.* at 573.



effect of the ordinance was not punitive under the *Wallace* analysis.<sup>99</sup>

In *Upton v. State*,<sup>100</sup> the Indiana Court of Appeals analyzed a more traditional ex post facto problem. The case regarded a statute enacted after Upton committed his crime that required those convicted of certain offenses to earn credit time (“good time”) at a slower rate than under the law in effect when Upton committed his crime.<sup>101</sup> After Upton was arrested and charged with child molesting, the Indiana General Assembly enacted a new statute providing that persons convicted of certain offenses—including child molesting—after June 30, 2008 could only earn credit time at the rate of one day for every six days of imprisonment.<sup>102</sup> After Upton was convicted, the sentencing judge applied this newly enacted provision to him,<sup>103</sup> with the effect that he would have to serve more time in incarceration than if the statute had not been enacted (providing that his behavior was good).<sup>104</sup>

The court concluded that applying the new statute to Upton violated the ex post facto clause because it increased his punishment after he committed his crime.<sup>105</sup> When Upton committed his offense, he was eligible to earn credit time at the rate of one day for every day of incarceration.<sup>106</sup> After the new law took effect, he could earn credit time only at the rate of one day for every six days of incarceration.<sup>107</sup> The State conceded that this statute, as applied to Upton, violated the ex post facto clause.<sup>108</sup> The Indiana Court of Appeals agreed, reversing the sentence and remanding for resentencing.<sup>109</sup>

### B. Right to Education—Article 8

The Indiana Supreme Court held that the Indiana Constitution conveys no judicially enforceable standard of educational quality or individual right to pursue a public education in *Bonner ex rel. Bonner v. Daniels*.<sup>110</sup> This decision vacated an Indiana Court of Appeals decision concluding that the Indiana Constitution did mandate certain educational quality standards, a decision discussed in this Article last year.<sup>111</sup> Many other states have entertained this type

---

99. *Id.* at 574.

100. 904 N.E.2d 700 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 994 (Ind. 2009).

101. *Id.* at 704-05.

102. *Id.* at 705.

103. *Id.*

104. *Id.* at 702.

105. *Id.* at 706.

106. *Id.* at 705-06.

107. *Id.*

108. *Id.* at 706.

109. *Id.*

110. 907 N.E.2d 516 (Ind. 2009).

111. Jon Laramore, *Indiana Constitutional Developments: Evolution on Individual Rights*, 42 IND. L. REV. 909, 911 (2009) (discussing *Bonner ex rel. Bonner v. Daniels*, 885 N.E.2d 673 (Ind. Ct. App. 2008)).

of litigation, which in some states has resulted in significant changes in school funding.<sup>112</sup>

The *Bonner* plaintiffs sought a declaratory judgment that the current school funding formula violated article 8, section 1 and other constitutional provisions by failing to provide an education of sufficient quality to equip students for responsible citizenship and economic productivity.<sup>113</sup> The trial court dismissed, finding that the constitutional provisions conveyed no judicially enforceable duty.<sup>114</sup> The plaintiffs insisted that they sought only a declaration that current school funding laws did not meet the constitutional standard, not any judicial determination that any specific standard was required.<sup>115</sup> The plaintiffs asserted that if the court deemed the funding formula unconstitutional, it was reasonable to assume that the General Assembly would attempt to correct the problem.<sup>116</sup>

Article 8, section 1 states:

Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.<sup>117</sup>

The court held that this language simply required the General Assembly to create a general and uniform system of common schools, not that those schools attain any particular standard.<sup>118</sup> The court concluded that the language about the importance of education for “a free government,” and the encouragement of “moral, intellectual, scientific, and agricultural improvement” was merely “general and aspirational” and did not create any enforceable rights.<sup>119</sup> “The Clause says nothing whatsoever about educational quality,” the court held.<sup>120</sup>

The court also gleaned from its earlier decision in *Nagy v. Evansville-Vanderburgh School Corp.*<sup>121</sup> that the General Assembly had complete authority to determine what should be included in Indiana’s educational program.<sup>122</sup> In that case, parents complained that they were being required to pay fees for portions

---

112. See The National Access Network, Litigation, <http://www.schoolfunding.info/litigation/litigation.php3>.

113. *Bonner*, 907 N.E.2d at 518-19.

114. *Id.* at 518.

115. *Id.* at 519.

116. Brief of Appellees at 45, *Bonner ex rel. Bonner v. Daniels*, 885 N.E.2d 673 (Ind. Ct. App. 2008) (49A02-0702-CV-00188).

117. IND. CONST. art. 8, § 1.

118. *Bonner*, 907 N.E.2d at 521.

119. *Id.* at 520.

120. *Id.* at 521.

121. 844 N.E.2d 481 (Ind. 2006).

122. *Bonner*, 907 N.E.2d at 521 (citing and quoting *Nagy*, 844 N.E.2d at 491).



of the educational program that should be “without charge” under article 8.<sup>123</sup> The court concluded that the General Assembly had authority to prescribe the educational program, which had to be provided “without charge” unless the legislature expressly stated that fees could be charged.<sup>124</sup> *Bonner* concluded that article 8 gave the General Assembly discretion to determine what constituted adequate education, so the courts had no role in enforcing any quality standards.<sup>125</sup>

The court also rejected the other claims in *Bonner*.<sup>126</sup> It rejected the claim that the Indiana Constitution creates any individual right to education, concluding that it only mandated that the General Assembly create a system of common schools.<sup>127</sup>

Justice Boehm concurred in a separate opinion.<sup>128</sup> He agreed that the Indiana Constitution “imposes no particular level of quality on the educational product of our schools,” but concluded that the courts could enforce the constitutional requirements that schools be available “generally throughout the state” and be “uniform.”<sup>129</sup>

Justice Rucker dissented.<sup>130</sup> “[T]he relief plaintiffs seek is simply a declaration that the education being provided to them and the system for funding that education fall short of the constitutional mandate to provide for a general and uniform system of open common schools.”<sup>131</sup> He concluded that the courts were capable of determining the validity of this claim and, therefore, the court should not have dismissed the complaint.<sup>132</sup>

### *C. Rights of the Accused—Article 1, Section 13*

Both the Indiana Supreme Court and the Indiana Court of Appeals addressed instances in which persons accused of crimes claimed rights under the Indiana Constitution exceeding their rights under the U.S. Constitution.

In *Bassett v. State*,<sup>133</sup> the defendant was convicted of murder.<sup>134</sup> On appeal, he challenged the admissibility of recorded statements he made to his attorney on the prison telephone system.<sup>135</sup> The telephone system produced an oral

---

123. *Nagy*, 844 N.E.2d at 483.

124. *Id.* at 491-92.

125. *Bonner*, 907 N.E.2d at 522.

126. *Id.*

127. *Id.*

128. *Id.* at 523.

129. *Id.* at 523-24 (Boehm, J. concurring).

130. *Id.* at 523.

131. *Id.* at 525 (Rucker, J. dissenting).

132. *Id.*

133. 895 N.E.2d 1201 (Ind. 2008), *cert. denied*, 129 S. Ct. 1920 (2009).

134. *Id.* at 1204.

135. *Id.* at 1205.

warning at the beginning of each call that calls were subject to being recorded.<sup>136</sup> In rejecting Bassett's argument under article 1, section 13, the Indiana Supreme Court affirmed the importance of lawyer-client privilege by concluding that their in-person communications during the attorney's visits to the jail were confidential.<sup>137</sup> But the recorded telephone conversations were not protected by privilege because "Bassett failed to safeguard the confidentiality of communications with his attorney" by having those conversations on a line he knew was subject to recording.<sup>138</sup> The court did not exclude the recorded telephone conversations, finding no section 13 violation.<sup>139</sup>

The Indiana Supreme Court also addressed a section 13 issue in *Edwards v. State*.<sup>140</sup> The court received the case on remand from the U.S. Supreme Court, which decided that just because a defendant was mentally competent to stand trial that defendant may not be sufficiently competent to represent himself at trial.<sup>141</sup> On remand, the Indiana Supreme Court concluded that the record contained sufficient evidence for it to determine that Edwards was competent to stand trial but (under the U.S. Supreme Court's newly announced standard) not competent to represent himself.<sup>142</sup>

The court then addressed a separate state constitutional claim that the Indiana Constitution conveys a broader right to self-representation than the U.S. Constitution.<sup>143</sup> The court noted that "[s]ection 13 does provide broader rights than the Sixth Amendment. But each of these expanded rights dealt with the right to counsel, and none addressed the right of self-representation."<sup>144</sup> The court also acknowledged textual differences in the Indiana Constitution, which guarantees the accused the right "to be heard by himself" and places a unique value on the accused's right to speak out personally in the courtroom.<sup>145</sup> But the court concluded, despite these differences, that the section 13 right to self-representation is no broader than that in the Sixth Amendment.<sup>146</sup>

The Indiana Court of Appeals addressed two situations in which witnesses did not appear for trial, leading to claims by defendants that they were deprived of their state constitutional right to cross-examine witnesses against them. In *Morgan v. State*,<sup>147</sup> a subpoenaed witness came to court but fled before he could testify; law enforcement officers were unable to locate him.<sup>148</sup> Several jurors

---

136. *Id.* at 1207.

137. *Id.* at 1206-07.

138. *Id.* at 1207.

139. *Id.* at 1207-08.

140. 902 N.E.2d 821 (Ind. 2009).

141. *Indiana v. Edwards*, 128 S. Ct. 2379, 2387-88 (2008).

142. *Edwards*, 902 N.E.2d at 825-28.

143. *Id.* at 828.

144. *Id.*

145. *Id.* at 829.

146. *Id.*

147. 903 N.E.2d 1010 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 993 (Ind. 2009).

148. *Id.* at 1014.



indicated that they had heard “something through the media or relatives about [the witness]’s disappearance.”<sup>149</sup> The Indiana Court of Appeals first ruled that the trial court correctly deemed the witness unavailable because the state was unable to procure his attendance, and it was therefore proper to read his discovery deposition into evidence.<sup>150</sup> The court also rejected Morgan’s argument that there should have been a mistrial because jurors heard rumors about the witness’s disappearance.<sup>151</sup> The court concluded that Morgan’s right to an impartial jury under article 1, section 13 was not violated because the jurors who heard rumors testified that they could disregard the rumors “and base their decision solely upon the evidence presented at trial.”<sup>152</sup>

In *Tiller v. State*,<sup>153</sup> a subpoenaed witness did not appear for trial, apparently because he left town out of fear about testifying.<sup>154</sup> The trial court found that the State had made adequate efforts to secure the witness’s testimony, and then allowed his discovery deposition to be used as evidence.<sup>155</sup> Tiller complained that he was denied his state constitutional right “to meet the witnesses face to face.”<sup>156</sup> The Indiana Court of Appeals concluded that the trial court’s action was proper.<sup>157</sup> Although the Indiana Constitution emphasizes the “face to face” confrontation right, if the State makes “a good faith effort” to obtain live testimony but cannot do so, it is proper to use prior, preserved testimony as long as the defendant had the right to cross-examine the witness on that prior occasion.<sup>158</sup>

#### *D. Right to Bear Arms—Article 1, Section 32*

In a case of first impression, the Indiana Court of Appeals looked at the constitutionality of a statute making possession of a type of weapon entirely unlawful in *Lacy v. State*.<sup>159</sup> The weapon was a switchblade knife, possession of which is a crime.<sup>160</sup> Lacy argued that this total ban violated section 32, which states that the “people shall have [a] right to bear arms, for defense of themselves and the State.”<sup>161</sup> The court concluded that the statute is an exercise of the State’s police power, exercise of which violates the Indiana Constitution only

---

149. *Id.*

150. *Id.* at 1017.

151. *Id.* at 1019-20.

152. *Id.* at 1019.

153. 896 N.E.2d 537 (Ind. Ct. App. 2008), *reh’g denied*, No. 45A03-08-02-CR-78, 2009 Ind. App. LEXIS 8 (Ind. Ct. App. Jan. 6, 2009).

154. *Id.* at 543-44.

155. *Id.* at 544.

156. *Id.* (citing IND. CONST., art 1, § 13).

157. *Id.* at 546-47.

158. *Id.* at 545-46.

159. 903 N.E.2d 486, 488 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 991 (Ind. 2009).

160. *Id.*; IND. CODE § 35-47-5-2 (2008).

161. *Lacy*, 903 N.E.2d at 489 (quoting IND. CONST. art. 1, § 32).

when it creates a “material burden” on a “core value” embodied in the constitution.<sup>162</sup> The court determined that the State’s exercise of its police power was valid because switchblade knives are dangerous and easily concealed, making them more useful in criminal operations than other knives.<sup>163</sup> The court then concluded that this valid exercise of police power did not materially burden a core value because Lacy retained her right to possess weapons, including knives not outlawed by Indiana Code section 35-47-5-2, just not the specific type of weapon at issue in this case.<sup>164</sup>

*E. Double Jeopardy—Article 1, Section 14*

Indiana’s appellate courts continued to apply Indiana’s constitutional analysis for “multiple punishments” double jeopardy, which differs from the federal analysis.<sup>165</sup> Under this analysis, two acts are the same offense, and therefore can be punished only once, if (1) the statutory elements of one offense establish the statutory elements of the second charged offense (“same elements” test); or (2) the evidence proving the first offense is the same as the evidence proving the second offense (“same evidence” or “actual evidence” test).<sup>166</sup>

In *Newgent v. State*,<sup>167</sup> the Indiana Court of Appeals vacated two convictions as double jeopardy violations.<sup>168</sup> Newgent was convicted of criminal confinement (count I), assisting a criminal (count II), and murder (count III).<sup>169</sup> The evidence showed that Newgent provided the murderer with the tools he used to kill, including a hammer and duct tape, and that Newgent supervised the victim while he was being confined, held the victim while he was being bludgeoned to death, and later moved the body.<sup>170</sup>

Newgent challenged his convictions for criminal confinement and assisting a criminal.<sup>171</sup> The court found that the State pointed to all the same evidence it relied on to convict Newgent of murder in urging the jury to convict Newgent of murder.<sup>172</sup> The State could have separated the evidence, using some in support of one offense and some in support of the other, but it did not.<sup>173</sup> Because there was a reasonable chance that the jury used the same evidence to convict of both

---

162. *Id.* at 490.

163. *Id.* at 490-92.

164. *Id.* The court specifically rejected the contrary holding in *State v. Delgado*, 692 P.2d 610 (Ore. 1984), in which the Oregon Supreme Court applied identical language to invalidate a ban on switchblade knives.

165. *Richardson v. State*, 717 N.E.2d 32, 49-50 (Ind. 1992) (describing the separate test).

166. *Id.*

167. 897 N.E.2d 520 (Ind. 2008).

168. *Id.* at 529-30.

169. *Id.* at 524.

170. *Id.* at 527.

171. *Id.* at 521-22.

172. *Id.* at 527.

173. *Id.*



offenses, the court found a double jeopardy violation and vacated the lesser offense.<sup>174</sup> The court also supported this conclusion by reference to Justice Sullivan's concurrence in *Richardson v. State*,<sup>175</sup> which, in its more mechanical analysis of double jeopardy, forbids "Conviction and punishment for a crime which consists of the very same act as an element of another crime for which the defendant has been convicted and punished."<sup>176</sup> The *Newgent* court found that the conduct alleged to meet the elements of the assisting a criminal charge were "the very same" as the acts alleged to satisfy the elements of the murder charge, verifying the double jeopardy violation.<sup>177</sup>

In *Graham v. State*,<sup>178</sup> the Indiana Court of Appeals found a double jeopardy violation when the trial court enhanced a sentence based on the same prior offense used to prove that the offender was a habitual offender.<sup>179</sup> Lengthening a sentence in two different ways because of the same prior act generally violates the Double Jeopardy Clause,<sup>180</sup> and the court remanded the case for resentencing.<sup>181</sup> Similarly in *Owens v. State*,<sup>182</sup> the court found that a conviction for robbery had been enhanced from a Class C to Class A felony for the same conduct that formed the basis for Owens' conviction for murder, violating double jeopardy principles.<sup>183</sup> The court vacated the enhancement.<sup>184</sup>

#### F. Criminal Jury as the Judge of the Facts—Article 1, Section 19

The Indiana Supreme Court revisited article 1, section 19, which states that "[i]n all criminal cases whatever, the jury shall have the right to determine the law and the facts,"<sup>185</sup> in *Walden v. State*,<sup>186</sup> an appeal challenging the determination that Walden was a habitual offender. Walden sought a jury instruction stating "[e]ven where the jury finds the facts of the prerequisite prior felony convictions to be uncontroverted, the jury still has the unquestioned right

---

174. *Id.* at 527-28.

175. 717 N.E.2d 32 (Ind. 1999).

176. *Newgent*, 897 N.E.2d at 528 (quoting *Richardson*, 717 N.E.2d at 55-56) (Sullivan, J. concurring)).

177. The court also vacated the conviction for assisting a criminal for similar reasons. *Id.* at 529-30.

178. 903 N.E.2d 538 (Ind. Ct. App. 2009).

179. *Id.* at 541.

180. *Mills v. State*, 868 N.E.2d 446, 451-52 (Ind. 2007) (holding that "absent explicit direction" double enhancements violate double jeopardy).

181. *Id.* at 541-42.

182. 897 N.E.2d 537 (2008), *appeal after new sentencing*, 916 N.E.2d 913 (Ind. Ct. App. 2009).

183. *Id.* at 539.

184. *Id.* at 540.

185. IND. CONST. art. 1, § 19.

186. 895 N.E.2d 1182 (Ind. 2008).

to refuse to find the Defendant to be a habitual offender at law.”<sup>187</sup> The trial court denied the instruction.<sup>188</sup> The Indiana Supreme Court found that Walden’s proffered instruction correctly stated the law,<sup>189</sup> but affirmed the trial court’s giving an instruction that simply repeated the constitutional language.<sup>190</sup> The court held that “the trial court is certainly not obligated to issue an invitation to the jury to disregard prior convictions in addition to informing the jury of its ability to determine the law and the facts.”<sup>191</sup>

Justices Dickson and Rucker each dissented separately.<sup>192</sup> Justice Rucker noted that “although Indiana juries have no right to disregard the law, under the clear wording of the [c]onstitution they still have the right to determine the law.”<sup>193</sup> He did not advocate jury nullification, but indicated his view that the instruction the majority approved was not “sufficient to advise the jury of its statutory authority in the habitual offender phase of trial. . . . Simply advising the jury that it has the right to determine the law and the facts falls woefully short of explaining how this right may be exercised.”<sup>194</sup> Justice Dickson also agreed that the more explicit instruction Walden proffered did a better job of informing the jury than the instruction the majority approved:

Innocuous, generic, non-specific jury instructions are not an adequate substitute for plain-language advisements that meaningfully explain to jurors the reality of their rights and permissible function under the law. In my view, the resulting obfuscation and secrecy [from the instruction the majority approved] is inconsistent with the Rule of Law.<sup>195</sup>

### G. Sentencing

The Indiana Court of Appeals rejected two claims under article 1, section 16, which requires that penalties be proportioned to the nature of the offense. In *Mann v. State*,<sup>196</sup> the court held that it was proper to punish Class B aggravated battery more severely than Class C battery because the former required an enhanced mental state—knowing or intentional infliction of injury—although both offenses involved the same type of injury.<sup>197</sup> In *Micheau v. State*,<sup>198</sup> the court held that a sentence for an *attempted* methamphetamine dealing conviction

---

187. *Id.* at 1184 (citing IND. CONST. art. 1, § 19).

188. *Id.* at 1186.

189. *Id.*

190. *Id.* at 1186-87.

191. *Id.* at 1186.

192. *Id.* at 1187.

193. *Id.* (Rucker, J., dissenting).

194. *Id.* at 1188.

195. *Id.* at 1190 (Dickson, J., dissenting) (footnote omitted).

196. 895 N.E.2d 119 (Ind. Ct. App. 2008).

197. *Id.* at 124.

198. 893 N.E.2d 1053 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 977 (Ind. 2009).



and for an actual methamphetamine dealing conviction was permissible because the amount of methamphetamine involved in the attempt conviction was larger than the amount involved in the actual dealing conviction.<sup>199</sup>

#### *H. Search and Seizure—Article 1, Section 11*

During the survey period, Indiana's courts continued to apply Indiana's unique search and seizure principles, which determine reasonableness based on the totality of circumstances, balancing the degree of suspicion that lawbreaking has occurred against the degree of intrusion the search method imposes on the citizen's ordinary activities.<sup>200</sup>

In *State v. Washington*,<sup>201</sup> the Indiana Supreme Court approved a consent search in connection with a traffic stop.<sup>202</sup> Police stopped Washington, who was riding a moped without a helmet, erroneously believing that he was younger than eighteen and therefore subject to a helmet requirement.<sup>203</sup> Because Washington seemed nervous, the officer asked him if he had any contraband, and Washington replied that he had marijuana.<sup>204</sup> The officer received permission from Washington to remove the bags of marijuana from Washington's pockets and he was charged with possession.<sup>205</sup> The State dismissed the charges after the trial court granted Washington's motion to suppress.<sup>206</sup> The Indiana Supreme Court concluded that there was no Fourth Amendment violation.<sup>207</sup>

Applying the Indiana Constitution, the court used the factors outlined in *Litchfield v. State*, balancing the degree of suspicion of lawbreaking, the degree of intrusion of the method of search, and law enforcement needs.<sup>208</sup> The court found a reasonable basis for stopping Washington and found the degree of intrusion minimal.<sup>209</sup> It concluded that the officer's action was not unreasonable under the circumstances.<sup>210</sup>

Two justices dissented.<sup>211</sup> Justice Boehm believed the officer violated article 1, section 11 after stopping Washington because his questioning on unrelated

---

199. *Id.* at 1061, 1067 (holding that two independent offenses were committed, one involving 12.96 grams of ephedrine and pseudoephedrine (the attempted dealing evidence) and the other involving 0.48 grams of methamphetamine (the dealing conviction)).

200. Laramore, *supra* note 111, at 918-25.

201. 898 N.E.2d 1200 (Ind. 2008), *reh'g denied*, No. 02S03-0804-CR-191, 2009 Ind. LEXIS 624 (Ind. May 14, 2009).

202. *Id.* at 1202-03.

203. *Id.* at 1203.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 1205.

208. *Id.* at 1206 (citing *Litchfield v. State*, 824 N.E.2d 356, 361 (Ind. 2005)).

209. *Id.*

210. *Id.* at 1208.

211. *Id.* at 1208-14.

subjects was not reasonable.<sup>212</sup> He stated that the Indiana Constitution “requires limiting questioning to the offense justifying the stop.”<sup>213</sup> Because the officer lacked reasonable suspicion that any other offense had been committed, he should not have open-endedly questioned Washington on other potential violations.<sup>214</sup> Similarly, Justice Rucker believed that the additional time the officer detained Washington to make inquiries unrelated to the stop was unreasonable and violated the Fourth Amendment.<sup>215</sup>

In *Meredith v. State*,<sup>216</sup> the Indiana Supreme Court upheld a search incident to a traffic stop.<sup>217</sup> The officer stopped Meredith because the officer was unable to read the temporary license plate in his back window.<sup>218</sup> During the stop, the officer asked Meredith for consent to search the car, which Meredith gave, and the officer found drugs.<sup>219</sup> The court held that the traffic stop was reasonable by analyzing various motor vehicle statutes and concluding that drivers must display and illuminate temporary license plates like a permanent plate, which Meredith had not done.<sup>220</sup> The court also approved the officer’s request to search despite his failure to give the warning that Meredith was entitled to legal counsel before giving consent to search, as required by *Pirtle v. State*.<sup>221</sup> The court concluded that although Meredith was the subject of a traffic stop, he was not actually in police custody (despite the officer’s testimony that Meredith was not free to leave); thus, *Pirtle* did not apply.<sup>222</sup> Justice Rucker dissented, asserting that the motor vehicle laws on temporary plates are ambiguous, so the officer lacked a justification to make the traffic stop.<sup>223</sup>

The Indiana Court of Appeals addressed several search cases under section 11. In *George v. State*,<sup>224</sup> the court approved police testing of a pill found during an inventory search of an impounded car, reasoning that the police inventory policy required it and testing the pill would increase the chances that whoever was prescribed the pill would not miss a scheduled dose.<sup>225</sup> In *Hathaway v. State*,<sup>226</sup> the court found that an automobile search that found a handgun was not reasonable and excluded the evidence.<sup>227</sup> The police searched after arresting

---

212. *Id.* at 1211 (Boehm, J., dissenting).

213. *Id.*

214. *Id.* at 1211-12.

215. *Id.* at 1213-14 (Rucker, J., dissenting).

216. 906 N.E.2d 867 (Ind. 2009).

217. *Id.* at 869.

218. *Id.*

219. *Id.*

220. *Id.* at 870-72.

221. *Id.* at 873 (citing *Pirtle v. State*, 323 N.E.2d 634, 640 (Ind. 1975)).

222. *Id.* at 874.

223. *Id.* at 874-75 (Rucker, J., dissenting).

224. 901 N.E.2d 590 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 990 (Ind. 2009).

225. *Id.* at 596-97.

226. 906 N.E.2d 941 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 558 (Ind. 2009).

227. *Id.* at 945-46.



Hathaway for driving without a license. Police insisted on searching his car before towing it, although the car's passenger was willing to drive it away.<sup>228</sup> The tow was therefore unnecessary (and no search was necessary to find evidence of driving without a license) so the search was unreasonable.<sup>229</sup>

The court also held a search reasonable in *Powell v. State*,<sup>230</sup> where police action included cutting cocaine out of Powell's underwear.<sup>231</sup> The court found the search reasonable because Powell was under arrest, the officers were going to transport him, and they had to determine what the object they found in their pat down was to ensure their safety.<sup>232</sup> They were able to remove the object with minimal intrusion because Powell wore his pants so low, and the arrest occurred in a location where no one was likely to see Powell's private parts.<sup>233</sup>

In *State v. Brown*,<sup>234</sup> the court invalidated a seizure.<sup>235</sup> Police stopped Brown on the street, questioned him when he appeared "nervous," and eventually ran his name through a database and learned his driver's license had been suspended.<sup>236</sup> He was prosecuted for driving without a license because he had been driving a car before police stopped him.<sup>237</sup> The court suppressed the result of the record search, resulting in dismissal of the charges, because the police lacked valid basis upon which to question Brown.<sup>238</sup>

### *I. Sentencing—Article 7, Section 4*

The Indiana Supreme Court issued at least four opinions using its authority to revise sentences under article 7, section 4.<sup>239</sup> Professor Schumm fully addresses these cases in his Article on developments in criminal procedure.<sup>240</sup> Perhaps the most notable of these is the divided opinion in *McCullough v. State*.<sup>241</sup> In that case, the majority concluded that appellate courts' power under article 7, section 4 extends not only to reducing sentences that are inappropriately

228. *Id.* at 943.

229. *Id.* at 945-46.

230. 898 N.E.2d 328 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 983 (Ind. 2009).

231. *Id.* at 330.

232. *Id.* at 336.

233. *Id.*

234. 900 N.E.2d 820 (Ind. Ct. App. 2009), *reh'g denied*, No. 3805-0810-CR-573, 2009 Ind. App. LEXIS 1576 (Ind. Ct. App. May 14, 2009), *trans. denied*, 919 N.E.2d 551 (Ind. 2009).

235. *Id.* at 821.

236. *Id.* at 821-22.

237. *Id.* at 822.

238. *Id.* at 823-24.

239. *McCullough v. State*, 900 N.E.2d 745 (Ind. 2009); *Hayes v. State*, 906 N.E.2d 819 (Ind. 2009); *Cardwell v. State*, 895 N.E.2d 1219 (Ind. 2008); *Harris v. State*, 897 N.E.2d 927 (Ind. 2008).

240. Joel Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 43 IND. L. REV. 691 (2010).

241. *McCullough*, 900 N.E.2d at 749-50.

severe, but also to increasing sentences—but only when the sentence is outside statutory authority or when the convicted person initiates the challenge to the sentence under article 7, section 4.<sup>242</sup>

*J. Due Course of Law—Article 1, Section 12*  
*Equal Privileges and Immunities—Article 1, Section 23*

Both Indiana appellate courts addressed several claims during the survey period that statutory enactments violated article 1, section 12, the due course of law clause, or article 1, section 23, the equal privileges and immunities clause. Claims under these two sections often are brought in the same lawsuit.<sup>243</sup> As has been habitual in the past several years, Indiana's appellate courts have been reluctant to find that the General Assembly has violated these provisions when it has enacted statutes, and this year was no exception to that trend.

In *State ex rel. Indiana State Police v. Arnold*,<sup>244</sup> the Indiana Supreme Court rejected a challenge to the statute permitting courts to expunge arrest records.<sup>245</sup> In this case, a trial court granted expungement to Arnold, who had been arrested for robbery but never charged.<sup>246</sup> The State Police Department later sought to overturn the expungement, arguing that Arnold did not meet the statutory criteria for expungement.<sup>247</sup> The Indiana Supreme Court ruled that the statute gave trial courts significant discretion and rejected the State Police's argument that discretion was fettered if the person seeking expungement had certain other criminal offenses on his record.<sup>248</sup> The court also rejected the State Police's argument that the court's own interpretation of the statute—giving courts significant discretion—violated the equal privileges and immunities clause because significant judicial discretion could lead to similarly situated persons being treated differently.<sup>249</sup> The court found that discretion, in and of itself, did not violate the equal privileges and immunities clause.<sup>250</sup>

*Herron v. Anigbo*<sup>251</sup> is one of the Indiana Supreme Court's periodic applications of the state constitution in the medical malpractice context.<sup>252</sup> The

---

242. *Id.*

243. Laramore, *supra* note 111, at 934-36.

244. 906 N.E.2d 167 (Ind. 2009).

245. *Id.* at 172.

246. *Id.* at 167-68.

247. *Id.* at 168.

248. *Id.* at 170-71.

249. *Id.* at 172.

250. *Id.* Chief Justice Shepard dissented on the statutory construction issue. *Id.* (Shepard, C.J., dissenting).

251. 897 N.E.2d 444 (Ind. 2008), *reh'g denied*, No. 45S03-0811-CV-594, 2009 Ind. LEXIS 119 (Ind. Feb. 10, 2009).

252. See *Martin v. Richey*, 711 N.E.2d 1273, 1279 (Ind. 1999) (holding that the Indiana Constitution does not require a discovery-base rule for statute of limitations); *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 603 (Ind. 1980) (holding that occurrence-based statute of



question was whether the two-year, occurrence-based statute of limitations could constitutionally be applied to Herron, who had post-operative complications after suffering a fall.<sup>253</sup> Herron filed his complaint approximately nine months after the two-year limitations period expired.<sup>254</sup> The court concluded that, in this case, as a matter of law Herron knew of a *potential* malpractice claim four months before the limitations period ran, and he had a duty to investigate the claim at that time rather than wait until he received more definitive evidence.<sup>255</sup> Because there was no obstacle to his investigation and filing before the limitations period ran, there was no denial of due course of law or equal privileges.<sup>256</sup> Justices Dickson and Rucker dissented, finding insufficient basis in the record to conclude that Herron should have known to investigate potential malpractice before the limitations period ran.<sup>257</sup>

The Indiana Court of Appeals addressed a similarly founded claim relating to workers' compensation in *Pavese v. Cleaning Solutions*.<sup>258</sup> The worker claimed that the statutory allocation of the burden of proof to the employee at all stages deprived him of due course of law under article 1, section 12.<sup>259</sup> She lost consciousness in a fall and was therefore unable to testify whether the fall was a result of her employment, and no medical evidence of the source of the fall could be found.<sup>260</sup> She was denied workers' compensation benefits because she could not prove that her injury arose from employment.<sup>261</sup> The court rejected her claim that the statutory burden allocation violated section 12.<sup>262</sup> First, the court found that she waived this point by failing to provide any supporting analysis.<sup>263</sup> Second, the court concluded that in the context of workers' compensation, a wholly statutory remedial scheme, the choice of allocation of burden of proof was entirely legislative.<sup>264</sup>

In *Gibson v. Department of Correction*,<sup>265</sup> the Indiana Court of Appeals rejected constitutional challenges to the addition of certain violent offenders to the Sex and Violent Offender Registry.<sup>266</sup> The court found no violation of article 1, section 23 because the class of persons required to register (murderers, attempted murderers, persons committing voluntary manslaughter, and persons

---

limitations periods are facially constitutional).

253. *Herron*, 897 N.E.2d at 447-48.

254. *Id.* at 447.

255. *Id.* at 449-50.

256. *Id.* at 452-53.

257. *Id.* at 454-55 (Dickson, J., dissenting).

258. 894 N.E.2d 570 (Ind. Ct. App. 2008).

259. *Id.* at 576-77.

260. *Id.* at 573-74.

261. *Id.* at 574.

262. *Id.* at 577.

263. *Id.*

264. *Id.*

265. 899 N.E.2d 40 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 987 (Ind. 2009).

266. *Id.* at 52-53, 55.

who have committed attempted voluntary manslaughter) have manifested intentional violent, deadly behavior toward others.<sup>267</sup> The fact that a prosecutor could charge a lesser offense for the same conduct so that the person would not be required to register did not render the statute unconstitutional because “there are sufficient inherent differences between murder, voluntary manslaughter, and attempts to commit those crimes, as compared with . . . other . . . offenses resulting in death, to permit the General Assembly to specify different treatment.”<sup>268</sup>

The court also rejected a challenge based on section 12.<sup>269</sup> The plaintiffs argued that, in contrast to sex offenders, data show that violent offenders are much less likely to reoffend. Placing them on the Registry serves no valid purpose and is arbitrary.<sup>270</sup> The court concluded that

the fact that there is some (albeit slight) recidivism among violent offenders at least for some time after release, and that community notification about violent offenders provides an opportunity for enhancing public safety ([a] legitimate state interest), the requirement that violent offenders register for at least some amount of time meets the low threshold of rational relation.<sup>271</sup>

In *Town of Chandler v. Indiana-American Water Co.*,<sup>272</sup> the Indiana Court of Appeals also rejected a section 23 challenge by a municipality to the Utility Regulatory Commission’s assertion of authority in a territorial dispute.<sup>273</sup> The court held that “[b]ecause Chandler is a municipality, it is not a citizen,” article 1, section 23 did not apply.<sup>274</sup>

## II. DECISIONS RELATING TO GOVERNMENTAL STRUCTURE AND POWERS

Indiana courts considered several cases involving the structure and powers of state government, including the right to vote, takings and the transfer of accessors’ duties.

### A. Right to Vote

The Indiana Court of Appeals invalidated Indiana’s voter identification law on state constitutional grounds in *League of Women Voters of Indiana, Inc. v. Rokita*.<sup>275</sup> The Indiana Supreme Court granted a petition for transfer during the

---

267. *Id.* at 51-52.

268. *Id.* at 52.

269. *Id.* at 53-54.

270. *Id.*

271. *Id.* at 55.

272. 892 N.E.2d 1264 (Ind. Ct. App. 2008).

273. *Id.* at 1270.

274. *Id.*

275. 915 N.E.2d 151 (Ind. Ct. App. 2009), *trans. granted, opinion vacated*, No. 49S02-1001-CV-50, 2010 Ind. LEXIS 85 (Ind. Jan. 25, 2010), *superseded*, 2010 Ind. LEXIS 412 (Ind. June 30,



survey period.<sup>276</sup>

Indiana's voter identification law, considered one of the most stringent in the United States,<sup>277</sup> permits a registered voter to vote in person only after presenting a government-issued identification with a photograph and expiration date.<sup>278</sup> Under the law, a registered voter who appears without identification required by the law may vote a provisional ballot, which is counted if the voter presents valid identification at the county clerk's office within ten days.<sup>279</sup> The U.S. Supreme Court rejected a federal constitutional challenge to the law in *Crawford v. Marion County Election Board*.<sup>280</sup>

The trial court had dismissed the case, concluding that the complaint failed to state a claim on which relief could be granted.<sup>281</sup> The Indiana Court of Appeals first concluded that the Secretary of State was a proper defendant, despite his protestations that he lacks power to enforce election laws (although he has other election-related duties and is named Chief Election Official by statute).<sup>282</sup> The court concluded that the League's complaint could be redressed by the Secretary of State in his role as advisor to local election officials because, if the League prevailed, the Secretary could advise local election officials not to enforce the statute.<sup>283</sup>

The court then rejected the League's claim that the voter identification law established new qualifications for voters, which may be done only by constitutional amendment and not by statute.<sup>284</sup> The court found that the voter identification requirement was not a qualification, but rather a restriction on the time, place, or manner in which qualified voters may vote, much like registration requirements.<sup>285</sup>

But the court did accept the League's argument that portions of the voter identification law violated article 1, section 23, the equal privileges and immunities clause.<sup>286</sup> Under that provision, which precludes the General Assembly from granting privileges or immunities to any group "which, upon the same terms, shall not equally belong to all citizens,"<sup>287</sup> requires that "disparate treatment accorded by . . . legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes" and that

---

2010).

276. *Id.*

277. David Stout, *Supreme Court Upholds Voter Identification Law in Indiana*, N.Y. TIMES, Apr. 29, 2008, <http://www.nytimes.com/2008/04/29/Washington/28cnd-Scotus.html>.

278. *Rokita*, 915 N.E.2d at 154-55.

279. *Id.* at 155.

280. 553 U.S. 181 (2008).

281. *Rokita*, 915 N.E.2d at 155-56.

282. *Id.* at 156-57.

283. *Id.* at 157.

284. *Id.* at 159-60.

285. *Id.* at 160-61.

286. *Id.* at 162-63, 165.

287. IND. CONST. art. 1, § 23.

“preferential treatment must be uniformly applicable and equally available to all persons similarly situated.”<sup>288</sup>

The court concluded that the voter identification law treated in-person voters differently than mail-in absentee voters, and that disparate treatment was not related to any inherent characteristics distinguishing the groups.<sup>289</sup> The Indiana Supreme Court has affirmed statutes treating mail-in absentee ballots more stringently because “inherent differences make mailed-in ballots more susceptible to improper influences or fraud.”<sup>290</sup> If mail-in absentees are more susceptible to fraud, the court reasoned, more stringent treatment of in-person voters is not reasonably related to any inherent characteristic distinguishing the two groups.<sup>291</sup>

The court also found that special treatment of voters residing in state-licensed care facilities, who also vote at those facilities, violated article 1, section 23.<sup>292</sup> The Secretary of State justified this different treatment by arguing that persons living in state-licensed care facilities generally are elderly or disabled and therefore may vote by absentee ballot, and eliminating the voter identification requirement makes it easier for them to vote in-person where they live.<sup>293</sup> He also argued that persons who vote in the very facility where they live are likely to be recognized and unlikely to commit fraud.<sup>294</sup> The court rejected this reasoning, concluding that there was nothing *inherent* in the status of living in a state-licensed care facility that was also a polling place that justified special treatment.<sup>295</sup>

The court rejected the League’s arguments that other, equally reliable types of identification should be allowed and that the voter identification law violated the rule that all voter qualifications must be uniform.<sup>296</sup>

The court noted that the General Assembly could easily remove the provision giving special treatment to persons living in state-licensed care facilities, eliminating that constitutional problem.<sup>297</sup> But it would be much more difficult, if not impossible, for the General Assembly to eliminate the disparate treatment of in-person and mail-in absentee voters.<sup>298</sup> Because of this inherent flaw, the court concluded that the statute had to be invalidated on its face and “declar[ed] . . . void.”<sup>299</sup>

---

288. *Rokita*, 915 N.E.2d at 161 (quoting *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994)).

289. *Id.* at 163.

290. *Id.* at 162.

291. *Id.* at 163.

292. *Id.* at 165.

293. *Id.*

294. *Id.*

295. *Id.* at 165.

296. *Id.* at 166.

297. *Id.* at 168.

298. *Id.*

299. *Id.* at 168-69.



*B. Takings—Article 1, Section 21*

The Indiana Supreme Court defined the boundaries of compensable takings in *State v. Kimco of Evansville, Inc.*,<sup>300</sup> a case involving the redesign of streets providing access to a shopping center. The streets around Kimco's Plaza East Shopping Center were reconfigured to improve traffic flow, thereby decreasing access to the shopping center.<sup>301</sup> The shopping center sued for damages, alleging that its customers had more difficulty reaching the shopping center after the street redesign, and won a \$2.3 million verdict.<sup>302</sup> The State appealed.<sup>303</sup> The court concluded that the shopping center's loss of access did not constitute a taking under article 1, section 21, aligning Indiana law with federal takings law.<sup>304</sup>

The court said that "the state and federal takings clauses are textually indistinguishable and are to be analyzed identically."<sup>305</sup> Under federal law, there is no taking unless the government action "deprives an owner of all or substantially all economic or productive use of his or her property," and Indiana adopted that standard in *Kimco*.<sup>306</sup> The court said: "although an elimination of rights of ingress and egress constitutes a compensable taking, the mere reduction in or redirection of traffic flow to a commercial property is not a compensable taking of a property right."<sup>307</sup> Because, in this case, the State's action only limited access to the shopping center but did not cut off that access altogether, there was no compensable taking.<sup>308</sup> Justices Dickson and Rucker dissented "believing that the Court of Appeals correctly decided this case," but they did not write a separate opinion.<sup>309</sup>

*Lindsey v. DeGroot*<sup>310</sup> was a challenge, on takings grounds, to the Indiana Right to Farm Act (the "Act"), in which neighbors of the DeGroot farm alleged that the statute unconstitutionally took away their right to sue for nuisance.<sup>311</sup> The Act states that a farming operation cannot constitute a nuisance, so long as it is operated properly and does not materially change its activities, "by any changed conditions in the vicinity of the locality after the agricultural or industrial operation . . . has been in operation continuously" on the site for at

---

300. 902 N.E.2d 206 (Ind. 2009), *reh'g denied*, 2009 Ind. LEXIS 625 (Ind. May 13, 2009), *cert. denied*, 2010 WL 154926 (U.S. Jan. 19, 2010).

301. *Id.* at 208-09.

302. *Id.* at 209-10.

303. *Id.*

304. *Id.* at 215-16.

305. *Id.* at 210.

306. *Id.* at 211 (citing *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-40 (2005)).

307. *Id.* at 214.

308. *Id.* at 214-15.

309. *Id.* at 216.

310. 898 N.E.2d 1251 (Ind. Ct. App. 2009).

311. *Id.* at 1255-56.

least one year.<sup>312</sup> The plaintiffs alleged that the Act essentially created an easement allowing odors from the DeGroot farm to permeate their property without recourse.<sup>313</sup> The plaintiffs premised their only constitutional theory on the Act creating an easement (which an Iowa court found in examining a similar statute<sup>314</sup>).<sup>315</sup> The court's rejection of that theory because no Indiana law supported the "seemingly unique Iowa holding that the right to maintain a nuisance is an easement," thus defeated the constitutional claim.<sup>316</sup>

### *C. Transfer of Assessor's Duties*

*Stoffel v. Daniels*<sup>317</sup> was a multi-faceted challenge to the statute that abolished most township assessors' positions. Stoffel was an elected township assessor, and the statute abolished her position at the end of her term.<sup>318</sup> Mid-term, however, it removed all of her duties and transferred them to the county assessor (and permitted the county to reduce her salary).<sup>319</sup> Stoffel argued that it was unconstitutional for the legislature to change a township assessor's duties during the middle of an elected term.<sup>320</sup> She cited article 6, section 3, which provided that township assessors "shall be elected, or appointed, in such manner as may be prescribed by law,"<sup>321</sup> article 15, section 2, which allows the legislature to establish terms of office, and article 15, section 3, which states that when a person is elected for a given term, "the same shall be construed to mean, that such officer shall hold his office for such term, and until his successor shall have been elected and qualified."<sup>322</sup> The court concluded that none of these provisions preclude the General Assembly from abolishing a legislatively created office in the middle of the term, nor do they prevent changing the duties of the office mid-term.<sup>323</sup> The court held "the Indiana General Assembly has the authority to curtail the duties, powers, and obligations of an elected township assessor, even during the middle of his elected term, and transfer these duties, powers, and obligations to the county assessor."<sup>324</sup>

---

312. IND. CODE § 32-30-6-9 (2008).

313. *Lindsey*, 898 N.E.2d at 1257-58.

314. *Churchill v. Burlington Water Co.*, 62 N.W. 646 (Iowa 1895).

315. *Id.* at 1258.

316. *Id.* at 1259.

317. 908 N.E.2d 1260 (Ind. Ct. App. 2009).

318. *Id.* at 1263-65 (citing IND. CODE §§ 36-6-5-1, -3 (2009)).

319. *Id.*

320. *Id.* at 1267 (citing IND. CODE art. 6, § 3 & art. 15, §§ 2, 3).

321. IND. CONST. art. 6, § 3.

322. *Id.* at 1267-68.

323. *Id.* at 1269-70.

324. *Id.* at 1270.



# RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

JOEL M. SCHUMM\*

The legislature and Indiana's appellate courts confronted several significant issues during the survey period October 1, 2008, to September 30, 2009. The General Assembly created new crimes and altered penalties for existing crimes, while the Indiana Supreme Court and Indiana Court of Appeals addressed a variety of issues ranging from the traditional fare of sentencing, sufficiency of evidence, and speedy trials, to more novel and far-reaching claims involving the sex offender registry and the propriety of *Anders* briefs.

## I. LEGISLATIVE DEVELOPMENTS

Passing a budget in the midst of economic difficulty dominated the General Assembly's long session in 2009.<sup>1</sup> A special session was required in June to complete the process,<sup>2</sup> but surprisingly little attention was given to changes in criminal statutes that could have positively affected the budget. Rather, the legislature added new crimes and enhanced existing penalties, which likely means the need for additional prison space in the future.

### A. New Offenses

As technology and the times change, so do the ways to commit crimes. The 2009 General Assembly addressed this evolving criminal behavior by enacting several new criminal offenses. Among the new offenses created by the General Assembly, a person who "knowingly or intentionally obtains, possesses, transfers, or uses the synthetic identifying information" commits a Class D felony.<sup>3</sup> Synthetic identifying information is defined as information that identifies: "(1) a false or fictitious person; (2) a person other than the person who is using the information; or (3) a combination of persons described under subdivisions (1) and (2)."<sup>4</sup> The offense is a Class C felony if the information comes from more than 100 persons or the fair market value of the harm exceeds \$50,000.<sup>5</sup> The statute exempts minors using fake identification to attempt to buy alcohol or tobacco;<sup>6</sup> however, the State may prosecute them under the separate statute criminalizing

---

\* Clinical Professor of Law, Indiana University School of Law—Indianapolis. B.A., 1992, Ohio Wesleyan University. M.A., 1994, University of Cincinnati. J.D., 1998, Indiana University School of Law—Indianapolis.

1. Matthew Tully, *Let's Hope This Is the End of Excruciatingly Bad Session*, INDIANAPOLIS STAR, June 30, 2009, at A1.

2. Mary Beth Schneider & Bill Ruthhart, *Budget Brings Good, Bad News for State Schools*, INDIANAPOLIS STAR, July 1, 2009, at A1.

3. IND. CODE § 35-43-5-3.8(a) (Supp. 2009).

4. *Id.* § 35-43-5-1(r).

5. *Id.* § 35-43-5-3.8(b).

6. *Id.* § 35-43-5-3.8(c).

the use of false information to obtain alcohol as a Class C misdemeanor.<sup>7</sup>

The General Assembly also created new offenses for computer merchandise hoarding<sup>8</sup> and the unlawful distribution of a hoarding program,<sup>9</sup> both Class A misdemeanors.<sup>10</sup>

It has long been a crime to impersonate a public servant or police officer,<sup>11</sup> but Indiana now has a separate crime for those who manufacture or sell police or fire insignia.<sup>12</sup> The offense begins as a misdemeanor but may be charged as a felony if the person knows or intends the badge to be used to commit impersonation of a public servant.<sup>13</sup>

Although the age of consent for sexual relations in Indiana is generally sixteen,<sup>14</sup> the child seduction statute criminalizes sex with children who are sixteen and seventeen when the adult is in a relationship of special trust, such as a teacher or custodian.<sup>15</sup> The statute was broadened in 2009 to include persons employed by charter schools, special education cooperatives, and those otherwise affiliated with schools or cooperatives when the person: (1) occupies a position of trust with the student, (2) provides care or supervision to the student, and (3) is at least four years older than the student.<sup>16</sup> The statute also criminalizes sex between children sixteen or seventeen years old and military recruiters who are attempting to enlist them.<sup>17</sup>

Finally, although not a new offense, the assisting a criminal statute was clarified, and perhaps broadened, by adding a new section on defenses:

(b) It is not a defense to a prosecution under this section that the person assisted:

- (1) has not been prosecuted for the offense;
- (2) has not been convicted of the offense; or
- (3) has been acquitted of the offense by reason of insanity.

However, the acquittal of the person assisted for other reasons may be a defense.<sup>18</sup>

---

7. *Id.* § 7.1-5-7-1(a).

8. *Id.* § 35-43-2-3(c).

9. *Id.* § 35-43-2-3(d).

10. *Id.* § 35-43-2-3(c), (d).

11. IND. CODE § 35-44-2-3 (2008).

12. IND. CODE § 35-44-2-5 (Supp. 2009).

13. *Id.* § 35-44-2-5(a), (b).

14. IND. CODE § 35-42-4-9(a) (2008).

15. IND. CODE § 35-42-4-7 (Supp. 2009).

16. *See id.* § 35-42-4-7(d)(3).

17. *Id.* § 35-42-4-7(k)(2)(B). The term military recruiter is defined in subsection (f). *See id.* § 35-42-4-7(f).

18. *Id.* § 35-44-3-2(b).



### B. Enhanced Penalties

In addition to creating new crimes and expanding existing ones, the General Assembly also enhanced penalties for several crimes. A first offense for animal cruelty is now a Class A, instead of Class B, misdemeanor; a second unrelated offense is a Class D felony.<sup>19</sup> A second, unrelated animal cruelty offense in conjunction with the offense of attending a fight involving animals is now a Class D felony instead of a Class A misdemeanor.<sup>20</sup> The legislature amended the trafficking with an inmate statute to increase the penalty from a Class A misdemeanor to a Class C felony if the item trafficked was a cellular phone.<sup>21</sup> Identity deception remains a D felony in most instances, but a parent's commission of identity deception against his or her child is now a Class C felony.<sup>22</sup> Finally, in response to a high profile bank robbery in which a bank teller's twin fetuses were killed,<sup>23</sup> the legislature enhanced the penalty for feticide from a Class C to a Class B felony.<sup>24</sup>

## II. SIGNIFICANT CASES

The Indiana Supreme Court and Indiana Court of Appeals addressed a wide range of issues that impact criminal cases from their inception to their conclusion. This section attempts to summarize the most significant of these decisions and offer some observations about the likely future impact of the decisions.

### A. Lab Reports and the Confrontation Clause

In terms of breadth and the number of cases affected, the most significant opinion during the survey period is *Melendez-Diaz v. Massachusetts*.<sup>25</sup> There, the U.S. Supreme Court made clear that lab reports prepared for use in criminal prosecutions fall within the "core class of testimonial statements" protected by the Confrontation Clause.<sup>26</sup> Such reports are inadmissible at trial "[a]bsent a showing that the analysts were unavailable to testify at trial and that [the defendant] had a prior opportunity to cross-examine them."<sup>27</sup>

Lab reports have long been crucial to proving drug and other cases with ease and without the need for live expert testimony. In the wake of *Melendez-Diaz*, prosecutors are seemingly required to produce a witness instead of a report. The

---

19. *Id.* § 35-46-3-7.

20. *Id.* § 35-46-3-10.

21. *Id.* § 35-44-3-9(d)(3).

22. *Id.* § 35-43-5-3.5(b)(3)(A).

23. Jon Murray, *Legislators Seek Longer Sentence for Killing Fetus*, INDIANAPOLIS STAR, Feb. 1, 2009, at A1.

24. IND. CODE § 35-42-1-6.

25. 129 S. Ct. 2527 (2009).

26. *Id.* at 2531-32.

27. *Id.* at 2532 (emphasis in original) (citing *Crawford v. Washington*, 541 U.S. 36, 54 (2004)).

executive director of the National District Attorneys Association described the decision as “a train wreck in the making.”<sup>28</sup> As he put it: “The court is saying you can’t submit an affidavit saying that the cocaine is cocaine. The criminalist must be there to testify the cocaine is cocaine. Particularly in rural states and in smaller communities, this is going to be a major problem.”<sup>29</sup> Within weeks, the Indiana Supreme Court addressed *Melendez-Diaz*, albeit largely on the more nuanced issue of *which witness* the State must call. In *Pendergrass v. State*,<sup>30</sup> the State called a DNA laboratory supervisor instead of the technician.<sup>31</sup> The majority found this sufficient based on language from *Melendez-Diaz*, explaining that the right to confrontation “does not mean that everyone who laid hands on the evidence must be called,” which it concluded “leaves discretion with the prosecution on which evidence to present.”<sup>32</sup> “The laboratory supervisor who took the stand did have a direct part in the process by personally checking [the technician’s] test results,” the majority reasoned.<sup>33</sup> On the same day the court decided *Pendergrass*, however, the court denied transfer in *Jackson v. State*,<sup>34</sup> which held that calling a supervisor was insufficient because he had performed none of the tests and only the technician could testify “whether she correctly followed each step in the testing process.”<sup>35</sup> *Jackson* is difficult to reconcile with the majority opinion in *Pendergrass*. Rather, the *Pendergrass* dissent (by Justice Rucker, joined by Justice Boehm) offers a stronger argument and is consistent with *Jackson*:

Although a supervisor might be able to testify to her charge’s general competence or honesty, this is no substitute for a jury’s first-hand observations of the analyst that performs a given procedure; and a supervisor’s initials are no substitute for an analyst’s opportunity to carefully consider, under oath, the veracity of her results.<sup>36</sup>

Thus, if the State calls a technician instead of a supervisor, it may avoid the uncertainty of a reversal if the specific facts are closer to *Jackson* than to *Pendergrass*. This construction is seemingly the safer course, especially if the *Pendergrass* approach does not withstand later U.S. Supreme Court review.

---

28. See David G. Savage, *Court Ruling Shakes Up Criminal Trials*, L.A. TIMES, July 26, 2009, at A3.

29. See *id.*

30. 913 N.E.2d 703 (Ind. 2009).

31. *Id.* at 704.

32. *Id.* at 707 (quoting *Melendez-Diaz*, 129 S. Ct. at 2532 n.1).

33. *Id.*

34. 891 N.E.2d 657 (Ind. Ct. App. 2008), *trans. denied*, 2009 Ind. LEXIS 1323 (Ind. Sept. 24, 2009).

35. *Id.* at 661.

36. *Pendergrass*, 913 N.E.2d at 711 (Rucker, J., dissenting).



### B. Guilty Pleas

In many cases, there is little or no doubt that the State can prove the facts necessary to secure a conviction. Therefore, a guilty plea may seem like the only sensible solution. However, the defendant may have a strong claim to suppress evidence because the police violated his or her Fourth or Fifth Amendment rights in securing the evidence. In those cases, defense counsel will likely file a motion to suppress, and the trial court will enter a ruling after hearing evidence and arguments.

If the trial court suppresses the evidence, the State may appeal as a matter of right if the ultimate effect is to preclude prosecution.<sup>37</sup> If the trial court does not suppress the evidence, the defendant may ask permission to pursue an interlocutory appeal.<sup>38</sup> For an interlocutory appeal to proceed, the trial court must certify the question, and the court of appeals must then accept the appeal.<sup>39</sup> In recent years, the court of appeals has accepted little over a quarter of such appeals.<sup>40</sup> If an interlocutory appeal is not granted or not pursued, the defendant could plead guilty or go to trial. In light of *Alvey v. State*,<sup>41</sup> going to trial is the only option.

In *Alvey*, the defendant entered into a plea agreement that expressly reserved the right to appeal the denial of his motion to suppress.<sup>42</sup> The Indiana Supreme Court, however, held that provision invalid and unenforceable: "A trial court lacks the authority to allow defendants the right to appeal the denial of a motion to suppress evidence when a defendant enters a guilty plea, even where a plea agreement maintains that such an appeal is permitted."<sup>43</sup> The court reasoned that a guilty plea is a significant event and includes consequences—specifically, a conviction and inability to appeal.<sup>44</sup> Allowing an appeal "would make settlements difficult to achieve and dramatically increase the caseload of the appellate courts."<sup>45</sup> The court concluded that defendants "cannot benefit from both the advantages of pleading guilty and the right to raise allegations of error with respect to pre-trial rulings."<sup>46</sup>

Although the majority's opinion is well-grounded in precedent, Justice Boehm's dissent highlights many of the practical problems with the majority's

---

37. See IND. CODE § 35-38-4-2(5) (2008).

38. See IND. APP. R. 14(B).

39. *Id.*

40. For example, 261 motions for permissive interlocutory appeal were filed with the Indiana Court of Appeals in 2008. 2008 COURT OF APPEALS OF INDIANA, ANN. REP. 10 (2009), available at <http://www.in.gov/judiciary/appeals/docs/2008report.pdf>. Less than twenty-seven percent, or seventy, of these appeals were granted. *Id.*

41. 911 N.E.2d 1248 (Ind. 2009).

42. *Id.* at 1249.

43. *Id.* at 1250 (citing *Lineberry v. State*, 747 N.E.2d 1151, 1155 (Ind. Ct. App. 2001)).

44. *Id.* at 1249.

45. *Id.* (citing *Tumulty v. State*, 666 N.E.2d 394, 396 (Ind. 1996)).

46. *Id.* at 1251.

approach. Most notably, on the point of judicial economy, “the majority’s refusal to permit a guilty plea reserving the right to appeal a denial will force the prosecution, the defendant and the court to go through the motions of a wholly unnecessary trial.”<sup>47</sup> Several states and the federal judiciary allow such appeals,<sup>48</sup> and those courts do not appear to be overwhelmed with appeals. Rather, the issue is one of timing—will the appeal occur after a plea agreement or after a trial? Moreover, allowing plea agreements with a right to appeal “gives the defendant whatever benefit a guilty plea provides in sentencing.”<sup>49</sup>

Barring legislative action or a significant change in the membership of the Indiana Supreme Court, the issue appears settled. Thus, parties cannot make agreements reserving the right to appeal a suppression claim, and defense counsel must insist on a trial in order to preserve the suppression issue for appeal. Waiving the right to jury trial may be advisable, and a liberal use of stipulations could help with concerns for judicial economy. If a defendant simply wants to preserve a suppression claim and otherwise accepts responsibility for the offense, it remains to be seen what mitigating weight might be afforded at sentencing. Courts have held that an early guilty plea saves victims from going through a full-blown trial and conserves limited prosecutorial and judicial resources; therefore, it is a mitigating circumstance entitled to significant weight.<sup>50</sup>

In the same guilty-plea-means-finality vein, the Indiana Supreme Court in *Norris v. State*<sup>51</sup> held that a guilty plea could not be challenged on post-conviction relief based on newly discovered evidence.<sup>52</sup> The court reiterated that a guilty plea “conclusively establishes the fact of guilt, a prerequisite in Indiana for the imposition of criminal punishment.”<sup>53</sup> Defendants know of their guilt when they enter a guilty plea, and upon the trial court’s acceptance of that plea, the defendant waives the right to later present evidence of innocence.<sup>54</sup>

Justice Boehm, joined by Justice Rucker, concurred in a separate opinion. “Any system of justice must allow for correction of injustice based on clear and convincing evidence of innocence, even if the defendant can be said to have contributed to his own plight by pleading guilty.”<sup>55</sup> Justice Boehm opined it was proper to “upset a guilty plea only where we have a very high degree of confidence that it was in fact incorrect,”<sup>56</sup> such as a claim of actual innocence supported by DNA evidence.<sup>57</sup>

---

47. *Id.* (Boehm, J., dissenting).

48. *See id.*

49. *Id.*

50. *See, e.g., Francis v. State*, 817 N.E.2d 235, 237-38 (Ind. 2004).

51. 896 N.E.2d 1149 (Ind. 2008).

52. *Id.* at 1152.

53. *Id.*

54. *Id.* at 1153.

55. *Id.* at 1154 (Boehm, J., concurring).

56. *Id.* at 1155.

57. *See id.* at 1154.



### C. Speedy Trials Under Criminal Rule 4

Indiana Criminal Procedure Rule 4 sets strict deadlines for bringing defendants to trial and has led to the reversal of convictions or discharge of many defendants over the years.<sup>58</sup> Although the rule makes clear it is the State's duty to bring a defendant to trial, exceptions have diminished, if not begun to swallow, the rule.<sup>59</sup>

In *Pelley v. State*,<sup>60</sup> the State sought counseling records from a third party nearly a decade and a half after multiple murders for which the defendant had been recently charged.<sup>61</sup> The trial court quashed the subpoena, and a lengthy interlocutory appeal was pursued.<sup>62</sup> Pelley was later tried and convicted of the murders, but the court of appeals reversed, concluding that Criminal Rule 4(C) contains no exception for interlocutory appeals and that Pelley was not responsible for the delay.<sup>63</sup>

The Indiana Supreme Court disagreed and reinstated the convictions.<sup>64</sup> It reasoned that the trial court proceedings had been stayed pending the interlocutory appeal, which rendered the trial court without jurisdiction to try the defendant.<sup>65</sup> The court emphasized that time is excluded from Criminal Rule 4 only when trial court proceedings are stayed, and the court noted that trial and appellate courts have discretion to deny stays when they are sought for inappropriate reasons or the issues involved are not critical to the case.<sup>66</sup> Although the records sought in *Pelley* were not critical to the case, the rule announced appeared to apply only prospectively.<sup>67</sup>

Beyond the fairly uncommon scenario of stays and interlocutory appeals in *Pelley*, the court of appeals addressed the broader issue of proving a speedy trial violation in *Gibson v. State*,<sup>68</sup> where the defendant argued that the State failed to bring him to trial within one year as required by Criminal Rule 4(C).<sup>69</sup> Although

---

58. See generally Joel M. Schumm & James A. Garrard, *Recent Developments in Criminal Law and Procedure*, 33 IND. L. REV. 1197, 1215-20 (2000).

59. For example, the court of appeals reiterated in *Wilkins v. State*, 901 N.E.2d 535 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 986 (Ind. 2009), that trial courts may make a finding of congestion, thus stopping the Criminal Rule 4 clock, without an assessment of its docket to ensure a speedy trial. A defendant whose case is continued "has priority over another speedy trial whose trial had been previously scheduled on that date." *Id.* at 538 (quoting *Bowers v. State*, 717 N.E.2d 242, 245 (Ind. Ct. App. 1999)).

60. 901 N.E.2d 494 (Ind. 2009).

61. *Id.* at 497-98.

62. *Id.*

63. *Id.* at 498 (citing *Pelley v. State*, 883 N.E.2d 874, 885 (Ind. Ct. App. 2008)).

64. *Id.* at 508.

65. *Id.* at 499.

66. *Id.* at 500.

67. *Id.* at 500, 508.

68. 910 N.E.2d 263 (Ind. Ct. App. 2009).

69. *Id.* at 266.

the Chronological Case Summary (CCS) entries showed he was granted several continuances, the defendant demonstrated that those entries were not correct.<sup>70</sup> The “bench trial/status” hearings scheduled throughout the period were merely pre-trial conferences for plea negotiations and not trial dates.<sup>71</sup> At another hearing, the prosecutor was not even present.<sup>72</sup> The court reiterated the State’s duty to bring a defendant to trial and found “no indication that Gibson ever did anything within the one-year period to prevent the State from bringing him to trial.”<sup>73</sup>

*Gibson* serves as a useful reminder to both trial judges and prosecutors of the importance of setting early trial dates and keeping careful and accurate track of delays under Criminal Rule 4. Defendants do not have the duty to bring themselves to trial, and demonstrating a violation of the rule may be relatively easy with the use of transcripts and the CCS.

#### *D. Crime or Not a Crime?*

Practitioners and judges often view challenges to the sufficiency of the evidence as a losing cause. If a jury or judge finds a defendant guilty, the standard of review for reversing the conviction is a high hurdle to clear.<sup>74</sup> As the following cases demonstrate, though, Indiana’s appellate courts will sometimes reverse convictions based upon insufficient evidence. These reversals sometimes suggest the issue is a legal one of broader applicability than the facts of the particular case.

*1. Insufficient Evidence.*—The appellate courts found insufficient evidence in cases involving the fairly common charges of resisting law enforcement, public intoxication, and criminal recklessness, while similarly finding the same with seldom-charged cases of official misconduct and possession of more than three grams of ephedrine.

Resisting law enforcement requires proof that a defendant “forcibly” resisted.<sup>75</sup> In several cases, courts have reversed convictions because the

---

70. *Id.* at 268.

71. *Id.* at 267-68.

72. *Id.* at 267.

73. *Id.* at 268.

74. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005).

Upon a challenge to the sufficiency of evidence to support a conviction, a reviewing court does not reweigh the evidence or judge the credibility of the witnesses, and respects the jury’s exclusive province to weigh conflicting evidence. We have often emphasized that appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. Expressed another way, we have stated that appellate courts must affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.

*Id.* (internal citations and footnotes omitted).

75. IND. CODE § 35-44-3-3(a)(1) (2008).



defendant's resistance was passive or otherwise did not involve force directed to the officer.<sup>76</sup> In *Graham v. State*,<sup>77</sup> the Indiana Supreme Court added to this string of reversals because the defendant's "refusing to present [his] arms for cuffing" did not constitute forcible resistance.<sup>78</sup> The court acknowledged that a decade and a half earlier, it had interpreted the term "forcibly resists" to require "strong, powerful, violent means . . . to evade a law enforcement official's rightful exercise of his or her duties."<sup>79</sup> In *Graham*, however, the court appeared to take a step back from that sweeping language, noting that "even 'stiffening' of one's arms when an officer grabs hold to position them for cuffing" would qualify as forcible resistance.<sup>80</sup>

Courts cited *Graham* just once during the survey period. In *Berberena v. State*,<sup>81</sup> the police officer offered no testimony about the defendant's use of force:

And I was struggling to gain control of his hands to place them behind his back.

\* \* \*

I just forcibly placed his hands [sic] and put them in handcuffs.

\* \* \*

Q: Officer, what was Mr. Barbarena [sic] doing with his hands when you tried to place him in handcuffs?

A: Sir, I don't exactly know. I know I was struggling with him to get control of his hands.

Q: Where did he have his hands?

A: Once again I can't recall.<sup>82</sup>

The court emphasized there was "no evidence of force," which remains a required element of the statute and decisional law interpreting it.<sup>83</sup>

In future cases, one might expect prosecutors not to charge resisting arrest when the officer cannot recall whether the defendant used any force. Alternatively, police officers may have a better recollection of some action, even

---

76. See, e.g., *Spangler v. State*, 607 N.E.2d 720, 724-25 (Ind. 1993); *Ajabu v. State*, 704 N.E.2d 494, 496 (Ind. Ct. App. 1998); *Braster v. State*, 596 N.E.2d 278, 280 (Ind. Ct. App. 1992).

77. 903 N.E.2d 963 (Ind. 2009).

78. *Id.* at 966.

79. *Id.* at 965 (quoting *Spangler v. State*, 607 N.E.2d 720, 723 (Ind. 1993)).

80. *Id.* at 966 (citing *Johnson v. State*, 833 N.E.2d 516, 517 (Ind. Ct. App. 2005)).

81. 914 N.E.2d 780 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 559 (Ind. 2009).

82. *Id.* at 782.

83. *Id.* at 783.

tensing up, to offer in support of “forcible” resistance.

Although defendants usually face bench trials on misdemeanor charges of resisting arrest,<sup>84</sup> they may consider requesting a jury trial when the evidence is merely that the defendant stiffened up, which may be viewed as an involuntary reaction to being grabbed by an officer effectuating an arrest. The pattern jury instruction merely lists, without elaboration, the “forcibly” requirement.<sup>85</sup> Moreover, the Indiana Supreme Court has made it clear that language from an appellate opinion, especially when it merely highlights a piece of evidence, is not appropriate fodder for a jury instruction.<sup>86</sup> If such cases went before juries that were given only a general definition of force, an acquittal might be more likely than in a bench trial.

Public intoxication requires a person to be intoxicated in a public place, i.e., a “place that is visited by many persons, and usually accessible to the neighboring public.”<sup>87</sup> In *Christian v. State*,<sup>88</sup> the court of appeals held that a driveway between two residences was not a public place.<sup>89</sup> The court reasoned that “[t]he State presented no evidence that the parking area was used by the public in general rather than only the residences next to the area.”<sup>90</sup>

Although resisting law enforcement and public intoxication charges are fairly common, charges of official misconduct are filed much less frequently. “A public servant who: knowingly or intentionally performs an act that the public servant is forbidden by law to perform . . . commits official misconduct, a Class D felony.”<sup>91</sup> The statutory language is broad and general, but “the heart of the issue in an official misconduct charge is explicit: whether the act was done by a public official in the course of his official duties.”<sup>92</sup> In *Heinzman v. State*,<sup>93</sup> the court reversed several convictions for official misconduct involving a Child Protective Services caseworker because he was no longer working in his official capacity when he molested a child.<sup>94</sup>

Continuing with uncommon crimes, although few people would think that buying two boxes of cold medicine is a crime, it can be a Class C misdemeanor.<sup>95</sup> Title 35, section 48-4-14.7(d) of the Indiana Code prohibits the purchase within

---

84. Defendants may request a jury trial in misdemeanor cases “by filing a written demand therefor not later than ten (10) days before [the] first scheduled trial date.” IND. CRIM. R. 22.

85. See IND. PATTERN JURY INSTRUCTIONS (CRIMINAL) § 5.23 (2008).

86. See generally Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 36 IND. L. REV. 1003, 1021-22 (2003).

87. *Christian v. State*, 897 N.E.2d 503, 505 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 983 (Ind. 2009) (quoting *Jones v. State*, 881 N.E.2d 1095, 1097 (Ind. Ct. App. 2008)).

88. *Id.*

89. *Id.* at 505.

90. *Id.*

91. IND. CODE § 35-44-1-2(1) (2008).

92. *State v. Dugan*, 793 N.E.2d 1034, 1039 (Ind. 2003).

93. 895 N.E.2d 716 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 978 (Ind. 2009).

94. *Id.* at 724.

95. See IND. CODE § 35-48-4-14.7(d) (2008).



one week of medication containing more than three grams of ephedrine, pseudoephedrine, or both.<sup>96</sup> In *Slone v. State*,<sup>97</sup> the defendant stipulated that she had bought two twenty-count packages of medication containing pseudoephedrine within one week and had taken the medication at a quicker rate than the recommended dosage.<sup>98</sup> Nevertheless, the court of appeals found insufficient evidence that Slone “knowingly” purchased more than three grams of pseudoephedrine.<sup>99</sup> The court reasoned that “consumers may be required to use the metric system making unit conversions and multiply quantities . . . none of which has the State proved Slone capable of doing.”<sup>100</sup> Moreover, it faulted the State for failing to “enter into evidence either of the packages of drugs which Slone purchased, so [the court could not] review what information regarding the contents those drugs was contained on the packaging or how such information was displayed on the packaging.”<sup>101</sup>

*Slone* appears to be anomalous of the usual approach to sufficiency review, in which the appellate court draws all inferences in support of the verdict.<sup>102</sup> Requiring the State to produce the medication boxes or to somehow demonstrate a defendant’s subjective knowledge poses a substantial, if not insurmountable, burden. In the context of many street drugs, where offenses are enhanced for the possession or sale of more than three grams,<sup>103</sup> *Slone* may lead defendants to argue, for example, that they thought they only possessed two and a half grams or did not understand the metric system.

The criminal offenses described above—indeed, almost every criminal offense in the Indiana Code—requires knowledge or intentional conduct. Relatively few offenses require only reckless conduct, which is when a person engaged in conduct “in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct.”<sup>104</sup> *State v. Boadi*<sup>105</sup> surveyed and synthesized significant cases of vehicular reckless homicide before concluding that “failing to stop at an intersection cannot, without more, constitute criminally reckless conduct.”<sup>106</sup> In *Boadi*, a semi-truck driver ran a red light at forty miles per hour on a clear day.<sup>107</sup> His vehicle was properly maintained, he had not been driving longer than

---

96. *Id.* The 2010 Indiana General Assembly amended this section, and the new provisions went into effect July 1, 2010. See 2010 Ind. Legis. Serv. P.L. 97-2010 (H.E.A. 1320) (West).

97. 912 N.E.2d 875 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 559 (Ind. 2009).

98. *Id.* at 880.

99. *Id.* at 881.

100. *Id.*

101. *Id.* at 880.

102. See, e.g., *id.* at 878-79 (quoting *Perez v. State*, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007)).

103. See, e.g., IND. CODE §§ 35-48-4-1(b), -6(b) (2008).

104. *Id.* § 35-41-2-2(c).

105. 905 N.E.2d 1069 (Ind. Ct. App. 2009).

106. *Id.* at 1074.

107. *Id.* at 1070.

regulations allowed, nor was he under the influence of any alcohol or drugs.<sup>108</sup> The court suggested that a different result could occur if a driver was speeding, had violated trucking regulations on rest, or was driving in poor weather conditions.<sup>109</sup>

2. *Sufficient Evidence.*—The appellate courts found sufficient evidence to support convictions for disorderly conduct by means of tumultuous conduct<sup>110</sup> and battery in a case involving purportedly consensual sadomasochism.<sup>111</sup> In *Bailey v. State*,<sup>112</sup> the Indiana Supreme Court upheld a conviction for disorderly conduct because the defendant engaged in “tumultuous conduct.”<sup>113</sup> The statute defines tumultuous conduct as conduct likely to result in serious bodily injury or substantial property damage.<sup>114</sup> In *Bailey*, a high school student threw down his drink and coat, stepped toward the dean of students “in an angry manner, clinched up his fists at his sides and let out a series of obscenities all within inches of [the dean’s] face.”<sup>115</sup> The student backed away upon seeing a police officer, but the dean testified that he “felt like [the student] was ready to hit me.”<sup>116</sup>

In *Govan v. State*,<sup>117</sup> the court of appeals revisited the contours of consent as a defense to battery.<sup>118</sup> In 1993, the court of appeals rejected consent as a defense to a gang initiation that included “twenty bare-fisted, hard blows” to the victim’s head.<sup>119</sup> In that case, the court made clear that consent may sometimes be a defense to battery, although it is not a defense where (1) “the defendant goes beyond acts consented to and beats to death the victim who consented only to the defendant’s execution of the organization’s initiation ritual of being struck in the stomach until he passed out”; (2) the conduct is “against public policy,” such as

---

108. *Id.* at 1071.

109. *Id.* at 1075.

110. *See Bailey v. State*, 907 N.E.2d 1003, 1006-07 (Ind. 2009).

111. *See Govan v. State*, 913 N.E.2d 237, 241, 243 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 558 (Ind. 2009). Although not expressly a sufficiency case, in *State v. Manuwal*, the Indiana Supreme Court addressed the fairly common offense of operating a vehicle while intoxicated but in the context of off-road driving. *Manuwal*, 904 N.E.2d at 657. The court held that operating an all-terrain vehicle on private property while intoxicated could be prosecuted under the general statutes prohibiting the operation of vehicles while intoxicated. *Id.* at 658-59; *see* IND. CODE §§ 9-30-5-1(b), -2 (2004). Such prosecution is possible because neither statute limits its application to public highways, nor does either statute reference “operator” or “highway,” which have separate statutory definitions that refer to public roadways. *Manuwal*, 904 N.E.2d at 658. Finally, the decision was consistent with prior court of appeals decisions that applied the operating-a-vehicle-while-intoxicated (OWVI) statutes to driving on private property. *Id.* at 659.

112. 907 N.E.2d 1003 (Ind. 2009).

113. *Id.* at 1007.

114. *Id.* at 1006 (citing IND. CODE § 35-45-1-1 (2008)).

115. *Id.* at 1007.

116. *Id.*

117. 913 N.E.2d 237 (Ind. Ct. App. 2009).

118. *Id.* at 241-43.

119. *Id.* at 241 (citing *Helton v. State*, 624 N.E.2d 499, 515 (Ind. Ct. App. 1993)).



when “there are no sexual overtones and the battery is a severe one which involves a breach of the public peace as well as an invasion of the victim’s physical security”; (3) consent was obtained by fraud or from a person lacking legal capacity; (4) a deadly weapon is used; (5) the victim is killed; or (6) “the battery is atrocious or aggravated.”<sup>120</sup>

Applying this precedent in *Govan*, the court concluded that the defense of consent was unavailable, even though the defendant claimed his girlfriend had consented to sadomasochistic sexual practices that included beating with an extension cord and branding with a hot knife.<sup>121</sup> Even though the case had sexual overtones, the use of a deadly weapon rendered consent unavailable.<sup>122</sup> Moreover, the court reasoned that the jury could have reasonably found a lack of consent based on testimony that the beating occurred because the victim had been with another man, that the victim subsequently locked herself in a closet where she tried to kill herself, and that the victim never mentioned consent when reporting the incident.<sup>123</sup>

No challenge was made to the jury instructions in *Govan*, and the opinion does not mention how the judge instructed the jurors. The opinion concludes, “[i]n such a highly charged domestic case as this, the jury is in the best position to make credibility determinations.”<sup>124</sup> In cases where the testimony is conflicting on consent, a jury is certainly well-positioned to make credibility determinations. However, it is unclear how the court would instruct the jury about the contours of consent as a defense. Furthermore, it is unclear if courts would even give an instruction in cases in which a deadly weapon was used, the battery was “atrocious or aggravated,” or the victim lacked capacity.<sup>125</sup> The jury would presumably be able to determine issues of capacity or atrociousness,<sup>126</sup> although the use of a deadly weapon might be deemed disqualifying by a trial court in refusing an instruction.<sup>127</sup>

3. *Move to Dismiss—or Wait for Trial?*—As a final point, these cases raise the issue of the means by which a defendant may challenge the sufficiency of the evidence to support a charge. In some cases, such as *Graham* and *Heinzman*, the defendants went to trial, were found guilty, and raised a sufficiency claim on appeal.<sup>128</sup> In other cases, such as *Boadi*, however, the defendants sought

---

120. *Id.* at 242 (citing *Helton*, 624 N.E.2d at 514).

121. *Id.* at 238, 242-43.

122. *Id.* at 242-43.

123. *Id.* at 243.

124. *Id.*

125. *See id.* at 242 (citing *Helton*, 624 N.E.2d at 514).

126. *See Harvey v. State*, 652 N.E.2d 876, 877 (Ind. Ct. App. 1995) (observing that defendants are “entitled to an instruction on any defense which has some foundation in the evidence, even when that evidence is weak or inconsistent”).

127. *See Mayes v. State*, 744 N.E.2d 390, 394 (Ind. 2001) (summarizing the requirements for instructions, including “whether there was evidence presented at trial to support giving the instruction”).

128. *See supra* notes 76-82, 92-93, and accompanying text.

dismissal of the charges in the trial court.<sup>129</sup> According to statute, dismissal of an information is required when the “facts stated do not constitute an offense.”<sup>130</sup> In cases in which the State’s evidence does not support the charged offense—or any other offense—a motion to dismiss would seem most appropriate to avoid the time, expense, and stress of a trial.

In other cases, however, if the State has filed the wrong charge, the best defense is to do nothing. When the State submits its evidence at trial, the defense can argue for an acquittal. If that fails, *Atteberry v. State*<sup>131</sup> provides an example of the appellate court reversing a conviction because the prosecutor filed the wrong charge.<sup>132</sup> There, the State charged rape although the evidence supported criminal deviate conduct.<sup>133</sup> “Fundamental due process and common sense both require that the State must prove the elements of the crime it charged, not the elements of some other crime . . . .”<sup>134</sup> The court concluded that “trauma to L.L.’s anus, plus the presence of semen stains in her underwear,” which would have supported a criminal deviate conduct charge, were insufficient to support a rape conviction.<sup>135</sup> Had the defendant filed a pretrial motion to dismiss, the State would surely have amended the charge. By waiting to raise the issue until the end of trial, however, the State lost the ability to amend the charge and double jeopardy principles barred a new trial on the correct charge.

#### *E. Dismissal of Charges for Incompetence to Stand Trial*

In *State v. Davis*,<sup>136</sup> a woman charged with Class D felony criminal recklessness was found incompetent to stand trial and committed to the Division of Mental Health and Addiction.<sup>137</sup> Three years later, a psychiatrist opined that the defendant “cannot be restored to competence,” and defense counsel moved to dismiss the charge.<sup>138</sup> The trial court granted the motion to dismiss, and the Indiana Supreme Court affirmed.<sup>139</sup> The court acknowledged that trial courts have “inherent authority to dismiss criminal charges where the prosecution of such charges would violate a defendant’s constitutional rights.”<sup>140</sup> The maximum

---

129. See *supra* notes 105-09 and accompanying text.

130. IND. CODE § 35-34-1-4(a)(5) (2008).

131. 911 N.E.2d 601 (Ind. Ct. App. 2009).

132. *Id.* at 603. Although *Atteberry* was a sufficiency case, a related theory is material variance, i.e., that the evidence at trial did not match the charge. See generally Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 34 IND. L. REV. 645, 659-61 (2001) (discussing *Allen v. State*, 720 N.E.2d 707 (Ind. 1999)).

133. *Atteberry*, 911 N.E.2d at 611.

134. *Id.*

135. *Id.*

136. 898 N.E.2d 281 (Ind. 2008).

137. *Id.* at 283-84.

138. *Id.* at 284.

139. *Id.* at 284, 290.

140. *Id.* at 285.



period of incarceration for a Class D felony is three years (with credit for time served<sup>141</sup>), which had long passed at the time of dismissal.<sup>142</sup>

*Davis* seems unlikely to lead to dismissals in many future cases. Many defendants found incompetent are restored to competence within months through medication. The relatively few who are not likely to be restored to competence will be able to secure dismissal only if charged with a relatively minor offense, as in *Davis*; those charged with more serious offenses will presumably need to wait until the maximum term of incarceration arrives before seeking dismissal.<sup>143</sup> Finally, as the court acknowledged in *Davis*, even in cases with a short period of incarceration, the State may argue against dismissal if it can point to a “substantial public interest” in securing a conviction,<sup>144</sup> such as the ability to use the conviction for a later enhancement or requirement of registration as a sex offender.

### F. Sentencing

Sentencing challenges come in many shapes and sizes, with some grounded in statutory provisions, others in the appellate rules, and some in constitutional provisions. Regardless of their basis, though, sentencing claims continue to be the most frequently raised and are often successful on appeal.

1. *Consecutive Sentences*.—Before discussing the significant developments during the survey period, this section begins with the biggest non-development. In *Oregon v. Ice*,<sup>145</sup> the U.S. Supreme Court considered whether the Sixth Amendment right to a jury trial limited the ability to impose consecutive sentences.<sup>146</sup> The majority acknowledged that the prohibition on judicial factfinding to increase punishments beyond the statutory maximum beginning in *Apprendi v. New Jersey*<sup>147</sup> had since been applied in other contexts, including the death penalty, state “standard” range sentencing, the Federal Sentencing Guidelines, and “upper term” sentences in a determinate sentencing scheme.<sup>148</sup> However, the Court refused to apply the same limitations to consecutive sentences, holding that “historical practice and respect for state sovereignty” counseled against extending *Apprendi*’s rule.<sup>149</sup> Agreeing with the majority’s stated concern for a “principled rationale,” Justice Scalia, writing for the four dissenters, aptly concluded “[t]he Court’s reliance upon a distinction without a difference, and its repeated exhumation of arguments dead and buried by prior

---

141. *Id.* at 289 (citing IND. CODE §§ 35-50-2-7, -6-3(a) (Supp. 2008)).

142. *Id.*

143. *See Davis*, 898 N.E.2d at 289.

144. *Id.* at 289-90.

145. 129 S. Ct. 711 (2009).

146. *Id.* at 714.

147. 530 U.S. 466, 490 (2000).

148. *Ice*, 129 S. Ct. at 716-17.

149. *Id.* at 717.

cases, seems to me the epitome of the opposite.”<sup>150</sup> The Oregon statutory scheme in *Ice* bore remarkable similarity to the one in Indiana, and the Indiana Supreme Court refused to apply *Apprendi* to consecutive sentences nearly five years ago in *Smylie v. State*.<sup>151</sup>

Indiana’s courts, however, consider limits on consecutive sentences based on statutory provisions. Defendants convicted of multiple, non-violent felonies as part of an episode of criminal conduct cannot be sentenced to an aggregate term greater than the advisory sentence for a felony one class higher than the most serious of their offenses.<sup>152</sup> For example, a defendant convicted of three non-violent Class D felonies as part of the same episode of conduct could face no more than four years, the advisory sentence for a Class C felony.<sup>153</sup> In *Dunn v. State*,<sup>154</sup> the defendant was convicted of three Class A misdemeanors and argued that his sentence could not exceed one and a half years, the advisory sentence for a Class D felony.<sup>155</sup> He relied on *Purdy v. State*,<sup>156</sup> which imposed a four-year cap on the sentence for a defendant convicted of one Class D felony and two Class A misdemeanors.<sup>157</sup> In *Dunn*, however, the court focused on the misdemeanor-only nature of the offenses and upheld the three-year sentence.<sup>158</sup> The court left a window open, though: “Dunn cites no other statutory, constitutional, or common law restrictions on consecutive sentences for misdemeanor[s].”<sup>159</sup> Defendants in the future may be better advised to argue the sentence is inappropriate under Indiana Appellate Rule 7(B), which affords a generous standard of review and plenty of examples of limitations on consecutive sentences.<sup>160</sup>

Although trial courts generally have discretion to impose consecutive sentences,<sup>161</sup> longstanding precedent forbids imposition of consecutive habitual offender enhancements. In *Breaston v. State*,<sup>162</sup> the supreme court reaffirmed those cases and made clear that the limitation applies even when a defendant is sentenced for crimes that are mandatorily consecutive under Indiana Code section 35-50-1-2(d) because that statute does not provide the requisite “express statutory

150. *Id.* at 723 (Scalia, J., dissenting).<sup>1</sup>

151. 823 N.E.2d 679, 686 (Ind. 2005), *superseded by statute as noted in* *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007).

152. IND. CODE § 35-50-1-2(c) (2008).

153. *Id.* § 35-50-2-6(a).

154. 900 N.E.2d 1291 (Ind. Ct. App. 2009).

155. *Id.* at 1291.

156. 727 N.E.2d 1091 (Ind. Ct. App.), *trans. denied*, 741 N.E.2d 1251 (Ind. 2000).

157. *Dunn*, 900 N.E.2d at 1292 (citing *Purdy*, 727 N.E.2d at 1094).

158. *Id.*

159. *Id.*

160. *See, e.g.,* *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008) (“Whether the counts involve one or multiple victims is highly relevant to the decision to impose consecutive sentences . . . .”); *see also infra* Part II.F.2 (discussing 7(B) cases decided during the survey period).

161. IND. CODE § 35-50-1-2(c) (2008).

162. 907 N.E.2d 992 (Ind. 2009).



authorization for . . . a tacking of habitual offender sentences.”<sup>163</sup> Citing *Breaston*, the supreme court found ineffective assistance of counsel in *Farris v. State*,<sup>164</sup> where counsel did not object to consecutive habitual offender enhancements imposed in separate trials on related charges.<sup>165</sup>

2. *Rule 7(B) Cases.*—Beyond the statutory limitations, many sentencing challenges are grounded in the court’s constitutional power to review and revise sentences, as implemented through Appellate Rule 7(B).<sup>166</sup> This is different from a challenge to the adequacy of the reasons stated by the trial court in imposing a sentence. As reiterated in *King v. State*,<sup>167</sup> a sentencing challenge may allege trial court error in its sentencing statement, which is reviewed for an abuse of discretion, or it may challenge the number of years or placement as inappropriate.<sup>168</sup> As to the latter, appellants must convince the appellate court a sentence is inappropriate in light of the nature of the offense and the character of the offender under Appellate Rule 7(B).<sup>169</sup> This is an independent review by the appellate court and not reviewed under an abuse of discretion standard.<sup>170</sup>

In *Cardwell v. State*,<sup>171</sup> the Indiana Supreme Court was remarkably candid about appellate sentence review in reducing a sentence from thirty-four years to seventeen for two counts of Class B felony neglect of a dependent.<sup>172</sup> The court acknowledged that “there is thus no right answer as to the proper sentence in any given case” and that it had “not adopted a consistent methodology in reviewing sentences.”<sup>173</sup> Rather, in reviewing sentences, the court usually describes “the nature of the offense and character of the offender (13 cases), but sometimes independently assign[s] weights to aggravators and mitigators (5 cases) or compare[s] the defendant’s sentence to others’ or the hypothetical ‘worst

---

163. *Id.* at 995 (quoting *Starks v. State*, 523 N.E.2d 735, 737 (Ind. 1988)).

164. 907 N.E.2d 985 (Ind. 2009).

165. *Id.* at 987-88.

166. *See* IND. CONST. art. 7, §§ 4, 6; IND. R. APP. P. 7(B). The Indiana Supreme Court has made clear that this provision allows for extensive sentence review “when certain broad conditions are satisfied.” *Neale v. State*, 826 N.E.2d 635, 639 (Ind. 2005); *see also* *Stewart v. State*, 866 N.E.2d 858, 865-66 (Ind. Ct. App 2007) (observing that the Indiana Supreme Court has reduced eleven of twenty-two sentences reviewed under Appellate Rule 7(B) since January 2003).

167. 894 N.E.2d 265 (Ind. Ct. App. 2008).

168. *Id.* at 267.

169. *Id.*

170. *Id.* In addition, *King* exemplified the difficulty in challenging the place a sentence is ordered to be served. As explained in last year’s survey, the court of appeals requires defendants challenging a placement to convince the court the placement is inappropriate, which is especially difficult because trial courts know the availability, costs, and entrance requirements for community corrections in a specific county. *See* Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 42 IND. L. REV. 937, 951 (2009) [hereinafter Schumm, 2009 *Recent Developments*] (discussing *Fonner v. State*, 876 N.E.2d 340 (Ind. Ct. App. 2007)).

171. 895 N.E.2d 1219 (Ind. 2008).

172. *Id.* at 1224-27.

173. *Id.* at 1224.

offender' (4 cases)."<sup>174</sup> The court emphasized that "[t]he principal role of appellate [sentence] review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived 'correct' result in each case."<sup>175</sup> Because the number of counts "is virtually entirely at the discretion of the prosecution[,] . . . appellate review should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count."<sup>176</sup> In reducing the sentence, the court noted that the defendant's knowledge of the temperature of the water that burned the child's hands was "vigorously contested," the trial court made "no findings" about prior abuse, and the disparity with the co-defendant's sentence was "stark."<sup>177</sup> Although cases like *Cardwell* highlight the willingness of appellate courts to reduce sentences, it also underscores the difficulty for defense counsel in advising a client about a plea agreement that includes a sentence waiver provision<sup>178</sup> when there is "no right answer" about sentencing in any case.<sup>179</sup> Nevertheless, *Cardwell* could be cited in future cases to argue the significance of disparity with a co-defendant's sentence or to diminish the impact of evidence offered by the State at sentencing when the trial court made no findings on the issue.

Other cases decided during the survey period provide examples of the parameters for 7(B) review. In *Tyler v. State*,<sup>180</sup> the Indiana Supreme Court emphasized that the defendant was emotionally troubled, had been in institutional placements for much of his childhood, and had an IQ in the range of sixty-one to seventy-two.<sup>181</sup> The court reduced the 110-year sentence to sixty-seven and a half years.<sup>182</sup> In *Mishler v. State*,<sup>183</sup> the court of appeals reduced a sentence in a child molestation case.<sup>184</sup> Although the court found that the two separate acts of molestation were "monstrous," it reduced the fifty-year maximum concurrent sentences to thirty-eight years based on the defendant's limited criminal history of possession of marijuana ten years earlier.<sup>185</sup> Cases like *Tyler* and *Mishler* should give defense counsel some pause when waiving the right to appeal a

---

174. *Id.* (citations and footnotes omitted)

175. *Id.* at 1225.

176. *Id.*

177. *Id.* at 1226.

178. In *Creech v. State*, 887 N.E.2d 73 (Ind. 2008), the Indiana Supreme Court held that "a defendant may waive the right to appellate review of his sentence as part of a written plea agreement." *Id.* at 75. The matter need not be discussed on the record if other evidence demonstrates the defendant entered into the agreement knowingly and voluntarily. *Id.* at 76.

179. *Cardwell*, 895 N.E.2d at 1224.

180. 903 N.E.2d 463 (Ind. 2009).

181. *Id.* at 469.

182. *Id.* at 468-69.

183. 894 N.E.2d 1095 (Ind. Ct. App. 2008).

184. *Id.* at 1097.

185. *Id.* at 1104.



sentence in a child molestation case. If the defendant has only a minimal criminal history, the maximum sentence will seldom be appropriate.

Although most 7(B) cases involve only an executed sentence, some challenged sentences include years suspended to probation. A significant split in the court of appeals has developed regarding the suspension of sentences under Rule 7(B) reviews. This issue first surfaced in *Beck v. State*.<sup>186</sup> There, the court observed the defendant's "suspended sentence of 365 days is not the maximum sentence permitted by statute."<sup>187</sup> Judge Mattingly-May wrote a concurring opinion in which she observed, "[a] 365-day sentence, whether suspended or served in the Department of Correction, is the 'maximum sentence.' A year is still a year, and a sentence is still a sentence. A suspended sentence is one actually imposed but the execution of which is thereafter suspended."<sup>188</sup> Judge Mattingly-May's position was adopted with little discussion in *Cox v. State*<sup>189</sup> and *Pagan v. State*.<sup>190</sup> Judge Sullivan wrote separately in *Cox* to express agreement with Judge Mattingly-May's view by noting, "[t]o be sure, a suspended maximum sentence is less onerous in its penal impact upon a defendant than a fully executed sentence, but it is not a sentence for less than the maximum number of years called for by statute."<sup>191</sup> Again the next year, another panel of the court of appeals in *Eaton v. State*<sup>192</sup> agreed with Judge Mattingly-May's view. Judge Kirsch dissented, expressing the view that "a suspended sentence is not the same as an executed sentence, and time spent on work release through a community corrections program is not the same as time spent in a state prison."<sup>193</sup> The issue did not arise again in a published opinion until July of 2009, where a unanimous panel in *Jenkins v. State* adopted the minority approach.<sup>194</sup> There, the court adopted Judge Kirsch's view in *Eaton*, concluding "[m]ost would agree that prison is worse than probation, and it is simply not realistic to consider a year of probation, a year in community corrections, and a year in prison as equivalent."<sup>195</sup>

The *Jenkins* approach, however, may not ultimately withstand Indiana Supreme Court scrutiny for several reasons. First, treating suspended sentences differently than executed sentences finds no support in the sentencing statutes, which should be of primary importance. The sentencing statutes focus on a number of years, with no mention of whether they are executed or suspended.<sup>196</sup> The sentencing range and advisory sentence for each class of felony is simply a

---

186. 790 N.E.2d 520, 523 (Ind. Ct. App. 2003).

187. *Id.* at 522.

188. *Id.* at 523 (Mattingly-May, J., concurring in result).

189. 792 N.E.2d 898, 904 n.6 (Ind. Ct. App. 2003).

190. 809 N.E.2d 915, 926 n.9 (Ind. Ct. App. 2004).

191. *Cox*, 792 N.E.2d at 906 (Sullivan, J., concurring in part and dissenting in part).

192. 825 N.E.2d 1287, 1290-91 (Ind. Ct. App. 2005), *overruled on other grounds by* Childress v. State, 848 N.E.2d 1073, 1077 n.2 (Ind. 2006).

193. *Id.* at 1291 (Kirsch, C.J., dissenting).

194. 909 N.E.2d 1080 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 555 (Ind. 2009).

195. *Id.* at 1084.

196. See IND. CODE § 35-50-2-1(c) (2008) (defining minimum sentences).

number of years—not a number of years suspended or executed.<sup>197</sup> For example, a “person who commits a Class C felony shall be imprisoned for a fixed term of between two (2) and eight (8) years, with the advisory sentence being four (4) years.”<sup>198</sup> A separate statute makes clear that trial courts “may suspend any part of a sentence for a felony, except as provided in this section or in section 2.1 of this chapter.”<sup>199</sup>

Next, although the Indiana Supreme Court has not squarely addressed the issue, making no distinction between executed and suspended sentences finds support in the court’s 7(B) decisional law. Although 7(B) reductions have primarily involved fully executed (and often maximum or consecutive) sentences, when a portion of the sentence has been suspended, the court has viewed suspended time no differently than executed time.<sup>200</sup> Moreover, in *Mask v. State*,<sup>201</sup> the court cited with approval Judge Mattingly-May’s concurring opinion in *Beck*.<sup>202</sup> Specifically, in addressing whether any suspended portion of a sentence must be considered a period of “incarceration” or “imprisonment” under Indiana Code section 35-50-1-2(c), the court concluded:

Incarceration in the context of subsection (c) does not mean the period of executed time alone. A suspended sentence differs from an executed sentence only in that the period of incarceration is delayed unless, and until, a court orders the time served in prison. In other words, the imposition of a suspended sentence leaves open the real possibility that an individual will be “sent to incarceration for some period” before being released from any penal obligation. This commonly occurs when probation or parole is revoked, and a defendant who received probation or parole is subject to incarceration until released.<sup>203</sup>

Finally, making no distinction between suspended and executed time is necessary to ensure defendants receive meaningful sentencing review. The Indiana Constitution provides for the review and revision of sentences.<sup>204</sup> It makes no distinction between sentences imposed on direct appeal or after a probation violation. A term of incarceration after a probation violation is no different from one imposed at a sentencing hearing; both defendants are at the Department of Correction for a fixed period where their liberty is restricted in significant ways. However, in *Prewitt v. State*,<sup>205</sup> the court adopted an abuse of

---

197. *Id.* §§ 35-50-2-3 to -7.

198. *Id.* § 35-50-2-6(a).

199. *Id.* § 35-50-2-2(a) (emphasis added).

200. *See, e.g.,* Neale v. State, 826 N.E.2d 635, 636, 639 (Ind. 2005) (reducing “the maximum” sentence of fifty years with ten suspended to forty years with ten suspended).

201. 829 N.E.2d 932 (Ind. 2005).

202. *Id.* at 936 (citing *Beck v. State*, 790 N.E.2d 520, 523 (Ind. Ct. App. 2003) (Mattingly-May, J., concurring in result)).

203. *Id.* (citation omitted).

204. *See* IND. CONST. art. 7, §§ 4, 6.

205. 878 N.E.2d 184 (Ind. 2007).



discretion standard for reviewing sentences after the revocation of probation.<sup>206</sup> This has been an especially high bar that no defendant has been able to meet before either the court of appeals or supreme court.<sup>207</sup>

Under the *Jenkins* approach, trial courts have a blank check to impose the full back-up time after the revocation of probation. Whether “almost any defendant, given the choice, would gladly accept a partially suspended sentence over a fully executed one of equal length”<sup>208</sup> is simply not relevant to the issue. Rather, the reality and consequences of a suspended sentence are crucial, and suspended sentences may—and often are—ordered served as executed sentences.<sup>209</sup>

3. *Increasing Sentences on Appeal.*—Defendants generally exercise their constitutional right to appeal with the presumption the worst that can happen is an “affirmed” at the bottom of the opinion and a continuation of the status quo. That understanding changed with *McCullough v. State*.<sup>210</sup> There, the Indiana Supreme Court offered a comprehensive review of article 7, section 6 of the Indiana Constitution, which created the power to review and revise sentences in 1970.<sup>211</sup> Although that provision had been applied exclusively for the benefit of defendants seeking a reduction in their sentence, the court concluded that “‘revise’ is not synonymous with ‘decrease,’ but rather refers to any change or alteration.”<sup>212</sup> This is consistent with the ABA Model Judicial Article and the British system on which the Indiana provision was based, which allows increased sentences on appeal.<sup>213</sup> The appellate courts, however, do not have an unfettered right to increase sentences on appeal.<sup>214</sup> Rather, only when a defendant seeks

---

206. *Id.* at 188.

207. *See, e.g., Jones v. State*, 885 N.E.2d 1286, 1290 (Ind. 2008) (affirming the court of appeals’s rejection of defendant’s abuse of discretion claim); *Podlusk v. State*, 839 N.E.2d 198 (Ind. Ct. App. 2005) (affirming revocation of probation and imposition of previously-suspended sentence, where notice of probation violation was filed five days after defendant left treatment facility and failed to inform probation department that probationer had moved back to her apartment, the address on file with the probation department).

208. *Jenkins v. State*, 909 N.E.2d 1080, 1084 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 555 (Ind. 2009).

209. *See id.* at 1084-85.

210. 900 N.E.2d 745 (Ind. 2009).

211. *Id.* at 746-49.

212. *Id.* at 749.

213. *Id.* at 749-50.

214. *See id.* at 750-51 (noting that defendant must first seek appellate review and revision of his sentence before an appellate court can even consider increasing the sentence). The court is free, however, to correct an illegal sentence, as in *Young v. State*, 901 N.E.2d 624 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 552 (Ind. 2009). In *Young*, the defendant was convicted of Class D felony operating a vehicle while intoxicated (OVWI) and of being an habitual substance offender (HSO). *Id.* at 625. Most of the OVWI time and all of the HSO time were suspended. *Id.* The mandatory HSO term is three to eight years, “[a]nd the trial court can only suspend that portion of the sentence in excess of three and a half years.” *Id.* at 626 (citing *Bauer v. State*, 875 N.E.2d 744, 750 (Ind. Ct. App. 2007)). Therefore, the case was remanded with instructions to order three and a half years

revision of the sentence will the court consider “whether to affirm, reduce, or increase the sentence.”<sup>215</sup> In responding to such a challenge, the State may present reasons for an increased sentence.<sup>216</sup> The State may not initiate a sentencing challenge on appeal or cross-appeal, however.<sup>217</sup>

Justice Boehm, joined by Justice Rucker, wrote a separate concurring opinion aptly noting that the majority’s approach “puts the defendant’s counsel in a very awkward position if upward revision by an appellate court is a realistic prospect.”<sup>218</sup> He counseled against forcing lawyers “to choose among raising the issue and obtaining an increased sentence, or foregoing the issue and either waiving appeal or raising frivolous issues.”<sup>219</sup> He concluded the court should “forthrightly” acknowledge its power to increase a sentence but make clear “we have never exercised it and do not expect to exercise it in the future except in the most unusual case.”<sup>220</sup>

In the six months of the survey period following *McCullough*, neither the supreme court nor court of appeals increased a sentence.<sup>221</sup> The court of appeals showed some reluctance to consider an increase in a case in the appellate pipeline at the time *McCullough* was issued. For example, in *Atwood v. State*,<sup>222</sup> the defendant requested a reduction in his twelve-year sentence for B felony possession of cocaine.<sup>223</sup> The sentencing range for a Class B felony is six to twenty years,<sup>224</sup> and the State requested an increase in the sentence.<sup>225</sup> However, *Atwood*’s initial brief was filed days before the supreme court issued *McCullough*.<sup>226</sup> Concerned that *Atwood* would not have raised the issue had he known his sentence could be increased, the court refused to consider the State’s request for an increase.<sup>227</sup> As to *Atwood*’s argument for a reduction, the court had

executed time. *Id.* This meant the defendant, who had completed his 240-day sentence, would have to serve nearly a year and a half additional executed time in jail or community corrections even with credit for good behavior.

215. *McCullough*, 900 N.E.2d at 750.

216. *Id.* at 751.

217. *Id.* at 750.

218. *Id.* at 753 (Boehm, J., concurring).

219. *Id.*

220. *Id.*

221. See, e.g., *Moore v. State*, 907 N.E.2d 179, 183 (Ind. Ct. App.) (“*McCullough* was handed down twenty-seven days *after* Moore’s counsel briefed this case, and we are not inclined to apply *McCullough* retroactively without specific direction from our supreme court allowing us to do so.”), *trans. denied*, 919 N.E.2d 555 (Ind. 2009).

222. 905 N.E.2d 479 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 556 (Ind. 2009).

223. *Id.* at 486.

224. *Id.* (citing IND. CODE § 35-50-2-5 (2008)).

225. *Id.* at 487.

226. *Id.*

227. *Id.* at 488. The court did not mention the possibility of filing an amended brief. Had *Atwood* been concerned about the possibility of an increase in the wake of *McCullough*, Appellate Rule 47 would have allowed him the opportunity to seek to amend his brief and abandon the



little trouble finding a two-year enhancement to the ten-year advisory term appropriate in light of his extensive criminal history of twenty-three adult convictions, including eight felony convictions.<sup>228</sup>

*McCullough* can be fairly criticized by both the defense bar and prosecutors. Defendants and defense lawyers are put in an odd position of trying to decide what could happen on appeal when the Indiana Supreme Court held just months earlier that there is no correct sentence in any case.<sup>229</sup> Fulfilling defense counsel's ethical duty to provide competent advice is difficult, to say the least. Ultimately, defense lawyers must describe and explain all of the options and let the client decide whether to roll the dice. In cases like *Atwood*, where the defendant has a lengthy criminal history and could face an increase of eight years, the best advice would seem to be not to press one's luck. The court of appeals would not likely reduce a sentence that is just two years above the advisory term when the defendant has a lengthy criminal history.

Moreover, prosecutors could understandably be unhappy with the inability to challenge a sentence, except when the defense makes the first move. The goal of consistency in sentencing seems unachievable by considering sentencing appeals only on a one-way street.<sup>230</sup> No matter how lenient a trial court is at sentencing, under *McCullough* the State cannot initiate an appeal of a sentence unless authorized to do so by statute. This differs from the federal system and some states.<sup>231</sup> The State has no opportunity to "leaven the outliers"<sup>232</sup> on the low end of the range. If a court imposes a minimum sentence, the defendant would have nothing to appeal, and *McCullough* prohibits the State from initiating on appeal.

Finally, *McCullough* could have a mixed effect on trial court judges. On one hand, it may lead judges to be more meticulous in explaining reasons for sentences at or below the advisory range to stave off a potential increase on appeal. Alternatively, it may lead to longer sentences. Trial judges, who must face the electorate every six years, could understandably be concerned by the prospect of one of their sentences being reversed as too lenient. However, having a lengthy sentence reduced on appeal would certainly play better with the electorate than having a lenient sentence increased on appeal.

---

sentencing issue. See IND. APP. R. 47.

228. *Atwood*, 905 N.E.2d at 488.

229. See *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008) ("There is . . . no right answer as to the proper sentence in any given case."); see also *supra* text accompanying notes 171-79.

230. See generally *Serino v. State*, 798 N.E.2d 852, 854 (Ind. 2003) (observing that "a respectable legal system attempts to impose similar sentences on perpetrators committing the same acts who have the same backgrounds").

231. See 18 U.S.C. § 3742(b) (2006); see also Christina N. Davilas, Note, *Prosecutorial Sentence Appeals: Reviving the Forgotten Doctrine in State Law as an Alternative to Mandatory Sentencing Laws*, 87 CORNELL L. REV. 1259, 1265-66 (2002) (explaining the prosecutorial appeal legislation enacted by Congress in the last thirty years).

232. See *Cardwell*, 895 N.E.2d at 1225.

### G. No Anders Briefs in Indiana

Previous survey articles have discussed the propriety of *Anders* briefs in Indiana.<sup>233</sup> The court of appeals suggested in 2002 that appointed counsel should file such a brief and seek to withdraw in cases with frivolous issues,<sup>234</sup> although a few years later the court found counsel had inappropriately invoked the procedure in a case with a meritorious sentencing issue.<sup>235</sup> Those articles concluded that counsel should never file an *Anders* brief because doing so would be inconsistent with longstanding precedent and would conflict with provisions of both the rules of professional conduct and the appellate rules.<sup>236</sup>

Although taking a slightly different path, the Indiana Supreme Court reached the same conclusion in *Mosley v. State*.<sup>237</sup> The court held, “in any direct criminal appeal as a matter of right, counsel must submit an advocative brief in accordance with Indiana Appellate Rule 46.”<sup>238</sup> The court explained that requiring such briefs—“no matter how frivolous counsel regards the claims to be—is quicker, simpler, and places fewer demands on the appellate courts.”<sup>239</sup> Moreover, this requirement avoids the prejudice to defendants caused “by flagging the case as without merit, which invites perfunctory review by the court.”<sup>240</sup> As Justice Boehm’s unanimous opinion put it, “in a direct appeal a convicted defendant is entitled to a review by the judiciary, not by overworked and underpaid public defenders.”<sup>241</sup>

Not only must appointed counsel file an advocative brief, but counsel must also be deliberate about choosing issues to make sure the client does not end up worse off after the appeal. As summarized above, the Indiana Supreme Court’s recent opinion in *McCullough* allowed appellate courts to *increase* sentences on appeal.<sup>242</sup> Although the court in *Mosley* suggested “in those few cases that offer no colorable argument of trial court error whatsoever, counsel may still be able to solicit a sentence revision or even a change in the law.”<sup>243</sup> In light of

233. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 40 IND. L. REV. 789, 818-20 (2007) [hereinafter Schumm, 2007 *Recent Developments*]; Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 37 IND. L. REV. 1003, 1016-19 (2004) [hereinafter Schumm, 2004 *Recent Developments*].

234. See *Packer v. State*, 777 N.E.2d 733, 737 (Ind. Ct. App. 2002), *overruled by Mosley v. State*, 908 N.E.2d 599 (Ind. 2009).

235. See *Seals v. State*, 846 N.E.2d 1070, 1076 (Ind. Ct. App. 2006), *overruled by Mosley*, 908 N.E.2d at 599.

236. Schumm, 2007 *Recent Developments*, *supra* note 233, at 818-20; Schumm, 2004 *Recent Developments*, *supra* note 233, at 1016-19.

237. 908 N.E.2d 599 (Ind. 2009).

238. *Id.* at 602.

239. *Id.* at 608.

240. *Id.*

241. *Id.*

242. See *supra* notes 210-20 and accompanying text.

243. *Mosley*, 908 N.E.2d at 608.



*McCullough*, arguing for a change in the law is surely the lower-risk route.

### H. Probation

During the survey period, the court of appeals clarified an important change to longstanding practice about the addition of probation conditions,<sup>244</sup> continued its trend of finding probation conditions unconstitutionally vague,<sup>245</sup> and reversed the revocation of probation in a case in which the State relied solely on a probation officer's unsworn testimony.<sup>246</sup>

Before 2005, the probation statute and case law interpreting it did not allow trial courts to impose additional terms of probation in the absence of a probation violation.<sup>247</sup> Effective in 2005, Indiana Code section 35-38-2-1.8 now provides:

(b) The court may hold a new probation hearing at any time during a probationer's probationary period:

(1) upon motion of the probation department or upon the court's motion; and

(2) after giving notice to the probationer.

(c) At a probation hearing described in subsection (b), the court may modify the probationer's conditions of probation. If the court modifies the probationer's conditions of probation, the court shall:

(1) specify in the record the conditions of probation; and

(2) advise the probationer that if the probationer violates a condition of probation during the probationary period, a petition to revoke probation may be filed . . .

(d) The court may hold a new probation hearing under this section even if:

(1) the probationer has not violated the conditions of probation; or

(2) the probation department has not filed a petition to revoke probation.<sup>248</sup>

In *Collins v. State*, the court of appeals made clear that those earlier precedents had been superseded by the 2005 amendment, which means just what it says: trial courts may "revise the terms of probation regardless of whether a probation violation has occurred."<sup>249</sup> Moreover, the amendment was remedial and therefore applied to *Collins* even though it was not in effect at the time of his offense.<sup>250</sup>

---

244. See *infra* text accompanying notes 252-58.

245. See *infra* text accompanying notes 259-61.

246. See *infra* text accompanying notes 262-65.

247. See, e.g., *Jones v. State*, 789 N.E.2d 1008, 1012 (Ind. Ct. App. 2003), *superseded by statute*, Act of Apr. 7, 2005, 2005 Ind. Acts 14, *as recognized in Collins v. State*, 911 N.E.2d 700, 708 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 559 (Ind. 2009).

248. IND. CODE § 35-38-2-1.8 (2008).

249. *Collins*, 911 N.E.2d at 708.

250. *Id.*

It posed no ex post facto problem because it did “not increase the punishment for or change the elements of any crime or deprive anyone of a defense or lesser punishment.”<sup>251</sup> The court correctly declined to follow another case decided during the survey period, *Ferrill v. State*,<sup>252</sup> which concluded that trial courts were without authority to modify probation terms absent a probation violation.<sup>253</sup>

In addition to clarifying this important statutory change, *Collins* followed earlier precedent in finding several special conditions of probation unconstitutionally vague.<sup>254</sup> *McVey v. State* had struck down many of the conditions two years earlier.<sup>255</sup> Specifically, the court in *Collins* remanded the following conditions for the trial court to reconsider and clarify with greater specificity: (1) restrictions on “dating” relationships; (2) a prohibition on “cruising”; (3) restrictions on engaging in “activities that could be construed as enticing children”; (4) a ban on possession of “sexually arousing materials”; and (5) a requirement to report “incidental contact with persons under age 18.”<sup>256</sup>

Finally, beyond addressing the appropriateness of probation conditions, the court also issued an important reminder on appropriate procedures and evidence at probation hearings. In *Tillberry v. State*,<sup>257</sup> the court reversed a probation revocation that occurred without any evidence or sworn testimony.<sup>258</sup> Although the petition to revoke the defendant’s probation alleged a new arrest, “an arrest standing alone will not support the revocation of probation. ‘Evidence must be presented from which the trial judge could reasonably conclude that the arrest was appropriate and that there is probable cause to believe the defendant violated a criminal law before the revocation may be sustained.’”<sup>259</sup> Moreover, the unsworn statement of a probation officer that the defendant had shown up only once was insufficient because it did not demonstrate that any appointments had been scheduled or missed.<sup>260</sup>

### *I. Sex Offender Registry*

With *Wallace v. State*,<sup>261</sup> the Indiana Supreme Court joined a small minority

---

251. *Id.* at 712.

252. 904 N.E.2d 323 (Ind. Ct. App. 2009).

253. *Collins*, 911 N.E.2d at 708 n.2 (citing *Ferrill*, 904 N.E.2d at 325).

254. *Id.* at 713-16.

255. *Id.* at 713-15 (citing *McVey v. State*, 863 N.E.2d 434, 447-50 (Ind. Ct. App. 2007)).

Previous survey articles discussed unconstitutionally vague probation conditions. See, e.g., Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 41 IND. L. REV. 955, 970-71 (2008).

256. *Collins*, 911 N.E.2d at 713-16.

257. 895 N.E.2d 411 (Ind. Ct. App. 2008).

258. *Id.* at 417.

259. *Id.* (quoting *Weatherly v. State*, 564 N.E.2d 350, 352 (Ind. Ct. App. 1990)).

260. *Id.*

261. 905 N.E.2d 371 (Ind. 2009).



of courts in striking down the sex offender registry on ex post facto grounds.<sup>262</sup> Justice Rucker's opinion for a unanimous court begins with a comprehensive history of Indiana's sex offender registry and the increasingly onerous and punitive requirements imposed since its initial enactment in 1994.<sup>263</sup> Wallace, who was charged with child molesting in 1988 and pleaded guilty in 1989, was required to register based on a 2001 amendment that required all sex offenders, regardless of the date of the offense, to register.<sup>264</sup> After he failed to register, he was charged with failing to register as a sex offender and unsuccessfully sought to dismiss the charge in the trial court.<sup>265</sup>

The federal and state ex post facto clauses forbid "punishment for an act which was not punishable at the time it was committed[, and laws that] impose[] additional punishment to that then prescribed."<sup>266</sup> The underlying principle is to provide "fair warning of that conduct which will give rise to criminal penalties."<sup>267</sup> Although the Indiana Court of Appeals had long held the federal and state analysis to be the same, the Indiana Supreme Court seized the opportunity in *Wallace* to reiterate the "unique vitality" of the state constitution.<sup>268</sup> Rather than adopting a separate test or analysis for the state constitutional provision,<sup>269</sup> the court applied the same analysis used by the U.S. Supreme Court and reached a different result.<sup>270</sup> Specifically, the court applied the "intent-effects" test, focusing on the statute's effects under the seven-factor test from *Kennedy v. Mendoza-Martinez*.<sup>271</sup> The court concluded that only one factor advanced a non-punitive interest while the others evinced a punitive effect, particularly the seventh factor of excessiveness.<sup>272</sup> As to that factor, the court

---

262. *See id.* at 374 n.1.

263. *Id.* at 374-77.

264. *Id.* at 373.

265. *Id.*

266. *Id.* at 377 (quoting *Weaver v. Graham*, 450 U.S. 24, 28 (1981)).

267. *Id.* (citing *Armstrong v. State*, 848 N.E.2d 1088, 1093 (Ind. 2006)).

268. *Id.* at 377-78.

269. *But cf.* *Malinski v. State*, 794 N.E.2d 1071, 1079 (Ind. 2003) (explaining that unlike the federal constitution, "law enforcement officials have a duty to inform a custodial suspect immediately when an attorney hired by the suspect's family to represent him is present at the station seeking access to him" under article 1, section 13); *Richardson v. State*, 717 N.E.2d 32, 52-53 (Ind. 1999) (separate analysis of the "actual evidence test" for double jeopardy claims); *Brown v. State*, 653 N.E.2d 77, 79-81 (Ind. 1995) (separate analysis of "reasonableness" for search and seizure claims); *Collins v. Day*, 644 N.E.2d 72, 75 (Ind. 1994) (separate analysis for the equal privileges and immunities clause); *Price v. State*, 622 N.E.2d 954, 957 (Ind. 1993) (separate analysis for political speech claims); accord Daniel O. Conkle, *The Indiana Supreme Court's Emerging Free Speech Doctrine*, 69 IND. L.J. 857, 857 (1994) (observing that the "analytical framework" in *Price* "differs dramatically from that which informs the First Amendment doctrine of the United States Supreme Court").

270. *Wallace*, 905 N.E.2d at 378.

271. *Id.* at 379 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

272. *Id.* at 384.

expressed concern that not only is “information on all sex offenders available to the general public without restriction and without regard to whether the individual poses any particular future risk,” but offenders have no mechanism to petition for removal despite proof of rehabilitation.<sup>273</sup>

In *Jensen v. State*,<sup>274</sup> decided the same day as *Wallace*, a fractured court reached a different result in addressing a challenge by a defendant classified as a sexually violent predator and required to register for life.<sup>275</sup> At the time of his guilty plea in 2000, Jensen was required to register as a sex offender for ten years.<sup>276</sup> The 2006 amendments, however, classified him as a “sexually violent predator” and required lifetime registration.<sup>277</sup> The plurality opinion, written by Justice Rucker and joined by the Chief Justice, found some of the *Mendoza-Martinez* factors weighed differently in distinguishing *Wallace*.<sup>278</sup> As to the weighty seventh factor, the plurality emphasized that the “broad and sweeping” disclosure requirements were in effect in 2000 and that sexually violent predators may petition the trial court after ten years to have their status changed, which could result in removal from the registry.<sup>279</sup>

Justice Sullivan concurred only in the result, opining that Jensen’s challenge was not yet ripe for adjudication.<sup>280</sup> “Only when the 10 year period has run—several years from now—will Jensen be subject to a registration requirement that might arguably be *ex post facto*.”<sup>281</sup> Justice Boehm, joined by Justice Dickson, wrote a dissenting opinion that analyzed the *Mendoza-Martinez* factors differently, concluding that the seventh factor in particular weighed in Jensen’s favor: “the newly enacted requirement of additional lifetime publication of Jensen’s picture captioned ‘Sex Predator’ in flashing red letters surely is of some severe consequence, and requires some determination that it remains appropriate for the individual offender a decade after the crime.”<sup>282</sup>

Within two months of *Wallace*, the supreme court further limited restrictions on sex offenders imposed by the residency restriction statute, while the court of appeals invalidated a local ordinance restricting sex offenders from city parks. In *State v. Pollard*,<sup>283</sup> the Indiana Supreme Court considered the reach of a statute that prohibits a person convicted of certain sex-related crimes from residing within 1,000 feet of school property, a youth center, or a public park.<sup>284</sup> Although the statute took effect July 1, 2006, the State charged Pollard, who had owned

---

273. *Id.*

274. 905 N.E.2d 384 (Ind. 2009).

275. *Id.* at 388-89.

276. *Id.*

277. *Id.* at 389.

278. *Id.* at 391-94.

279. *Id.* at 394.

280. *Id.* at 396 (Sullivan, J., concurring in result).

281. *Id.*

282. *Id.* at 398 (Boehm, J., dissenting).

283. 908 N.E.2d 1145 (Ind. 2009).

284. *Id.* at 1147 (citing IND. CODE § 35-42-4-11 (2006)).



property within the prohibited area for twenty years.<sup>285</sup> The court upheld the trial court's dismissal of the charge on ex post facto grounds because "it imposes burdens that have the effect of adding punishment beyond that which could have been imposed when his crime was committed."<sup>286</sup> In *Dowdell v. City of Jeffersonville*,<sup>287</sup> the court of appeals considered an ordinance that banned "sex offenders" from public parks and imposed fines or allowed criminal trespass prosecutions for violators.<sup>288</sup> A divided panel found the ordinance unconstitutional as applied to the plaintiff, whose duty to register as a sex offender had expired and who had sought to watch his minor son's Little League games.<sup>289</sup> Although the ordinance allowed offenders to petition for exemptions, the "provisions are extremely narrow at best and illusory at worst," requiring extensive documentation and accompaniment by a close relative, while imposing limitations on applications and allowing denials for virtually any reason.<sup>290</sup>

Although *Wallace* and its progeny resolved some significant issues, others remain as sex offender registry cases play out in a number of different ways. First, how may a person have his or her name removed from the registry? A few counties appear to have taken a proactive view by removing anyone who committed a crime before the state created the registry.<sup>291</sup> In other counties, however, offenders will be required to litigate the issue in a trial court.<sup>292</sup> Related to that issue, may the State prosecute someone with failure to register if his or her name is on the registry but should not be? This situation seems possible in counties that are not preemptively purging the registry, and the issue would presumably then need to be addressed through a defendant's motion to dismiss.

#### *J. Six-for-One Credit Time for Credit Restricted Felons*

Although not a registry case, *Upton v. State*<sup>293</sup> provides important relief to many convicted of sex offenses in Indiana. There, the Attorney General conceded, and the court of appeals found, that the 2008 amendments to the credit time statute were an ex post facto violation.<sup>294</sup> Before 2008, all defendants were eligible to earn two days of credit for each day served in jail or prison.<sup>295</sup> The 2008 amendment created a new class of "credit restricted felons" for certain child

---

285. *Id.* at 1147-48.

286. *Id.* at 1154.

287. 907 N.E.2d 559 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 552 (Ind. 2009).

288. *Id.* at 562.

289. *Id.* at 563-64.

290. *Id.* at 571.

291. Jeff Wiehe & Rebecca S. Green, *Ruling Clouds Sex-Offender Registry*, J.-GAZETTE (Fort Wayne, Ind.), Jan. 8, 2010, at A1, *available at* <http://www.journalgazette.net/article/20100108/LOCAL/301089961/1002/LOCAL>.

292. *See id.*; *see also* IND. CODE § 11-8-8-5 (Supp. 2009) (defining "sex or violent offender").

293. 904 N.E.2d 700 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 994 (Ind. 2009).

294. *Id.* at 705-06.

295. *See Schumm, 2009 Recent Developments, supra* note 170, at 939-40.

molesting or murder defendants who would instead earn one day for each six days imprisoned.<sup>296</sup> Although the legislature amended the statute to apply to “persons convicted after June 30, 2008,”<sup>297</sup> after *Upton* it may only apply to those who *commit* offenses after June 30, 2008.<sup>298</sup> This date is essential to both prosecutors and defense lawyers as they negotiate plea agreements in cases involving multiple counts or single counts alleged to have occurred both before and after the date. Some counts may be eligible for two-for-one credit, while others will require defendants to serve nearly eighty-five percent of their sentence under the new statute.

### K. Expungement

In *State ex rel. Indiana State Police v. Arnold*,<sup>299</sup> the Indiana Supreme Court offered important clarification of the expungement statute. Although the lengthy statute includes several requirements and exceptions, *Arnold* focused on subsection (f) of Indiana Code section 35-38-5-1, which states:

After a hearing is held under this section, the petition shall be granted unless the court finds:

1. the conditions in subsection (a) have not been met;
2. the individual has a record of arrests other than minor traffic offenses; or
3. additional criminal charges are pending against the individual.<sup>300</sup>

In *Arnold*, the defendant sought expungement of a 1993 robbery for which he was arrested but never charged.<sup>301</sup> Because he had arrests for several offenses beginning in 1991, the State argued the trial court could not grant expungement under subsection (f)(2).<sup>302</sup> The supreme court disagreed, focusing on the importance of the trial court’s discretion emanating throughout the statute.<sup>303</sup>

Under the plain language of subsection (f), if “the trial court finds none of the above three factors, it must grant the petition for expungement.”<sup>304</sup> If, under factor one, the conditions of subsection (a) have not been met—charges were dropped because of mistaken identity, no offense was committed, or there was no probable cause<sup>305</sup>—the trial court must deny the petition.<sup>306</sup> When only (f)(2) or (f)(3) is present, however, “the statute is silent as to whether the court is required

---

296. *Id.* at 940-42.

297. *Upton*, 904 N.E.2d at 704.

298. *Id.* at 706.

299. 906 N.E.2d 167 (Ind. 2009).

300. *Id.* at 169 (quoting IND. CODE § 35-38-5-1(f) (2008)).

301. *Id.* at 167.

302. *Id.* at 169.

303. *Id.* at 171.

304. *Id.* at 170.

305. IND. CODE § 35-38-5-1(a)(2) (2008).

306. *Arnold*, 906 N.E.2d at 170.



to deny the petition for expungement or whether it still has discretion to grant the petition.”<sup>307</sup> Because the statute gives “trial court[s] almost unfettered discretion to grant summarily or to deny summarily a petition for expungement” elsewhere in the statute, the court concluded the legislature could not have intended “to take away that discretion completely when the court decides to conduct a fact-finding hearing.”<sup>308</sup> Finally, the State’s interpretation that trial courts have no discretion in the face of a record of arrests could lead to absurd results, namely the inability to expunge an arrest of a person arrested twice (a “record of arrests”) when both arrests were the result of mistaken identity.<sup>309</sup>

---

307. *Id.*

308. *Id.* at 171.

309. *Id.*





# 2008-2009 ENVIRONMENTAL LAW SURVEY

SETH M. THOMAS<sup>\*</sup>  
VICTORIA CALHOON<sup>\*\*</sup>  
FREEDOM S.N. SMITH<sup>\*\*\*</sup>  
JENNIFER ANDRES<sup>\*\*\*\*</sup>  
ANGELA KRAHULIK<sup>\*\*\*\*\*</sup>

## INTRODUCTION<sup>1</sup>

Here, we survey the federal and Indiana court decisions decided between October 1, 2008 and September 30, 2009 most likely to affect Indiana environmental law practitioners.<sup>2</sup> As with the prior year's developments, this

---

\* Associate, Ice Miller LLP, Indianapolis. B.S., *summa cum laude*, 2001, Indiana University; J.D., *summa cum laude*, 2005, Indiana University School of Law—Indianapolis.

\*\* Associate, Ice Miller LLP, Indianapolis. B.A., 2001 Indiana University; J.D., *cum laude*, 2009, Indiana University School of Law—Indianapolis.

\*\*\* Associate, Ice Miller LLP, Indianapolis. B.A., *cum laude*, 2001, DePauw University, Indiana; J.D., *cum laude*, 2004, Indiana University School of Law—Bloomington.

\*\*\*\* Associate, Ice Miller LLP, Indianapolis. B.S., 1996, Indiana University; J.D., 2003, Indiana University School of Law—Indianapolis.

\*\*\*\*\* Associate, Ice Miller LLP, Indianapolis. B.A., 1997, Indiana University; J.D., *summa cum laude*, 2001, Indiana University School of Law—Indianapolis.

1. All opinions expressed in this Article are solely those of its authors, and should not be construed as opinions of Ice Miller LLP or any other person or entity.

2. Additional decisions of interest, include: *Catawba County, N.C. v. EPA*, 571 F.3d 20, 42-43 (C.A.D.C. 2009) (holding that, in general, EPA's methodology for designating areas as being in attainment, or non-attainment, for the annual National Ambient Air Quality Standards applicable to fine particulate matter was not arbitrary and capricious or in violation of CAA § 107(d)); *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*, 570 F.3d 856, 857-58 (7th Cir. 2009) (dismissing an appeal of a trial court's order relating to contribution for cleanup costs because there was not a final judgment issued by the court below); *Center for Biological Diversity v. U.S. Department of Interior*, 563 F.3d 466, 489 (C.A.D.C. 2009) (holding that Interior's actions leasing areas for offshore oil and gas development within the Outer Continental Shelf violated the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356a, because the lease program's environmental sensitivity rankings were irrational and did not comply with the requirements of the Act); *Sierra Club v. Franklin County Power of Illinois, LLC*, 546 F.3d 918, 923 (7th Cir. 2008) (holding that a CAA permit for construction of a facility had expired, requiring application for a new permit, where it was undisputed that excavation of the proposed facility did not begin within eighteen months of the issuance of the permit and permit specifically required that certain boilers be constructed within eighteen months for permit to remain valid); *Bitter Investment Venter II, LLC v. Marathon Ashland Petroleum, LLC*, No. 1:04-CV-477-TS, 2009 WL 1107796, \*6-8 (N.D. Ind. Apr. 24, 2009) (granting partial summary judgment for claims involving a leased location where the parties had entered into an unambiguous cancellation and release document regarding the lease agreement); *City of Mishawaka v. Uniroyal Holdings, Inc.*, No. 3:04-cv-125 CAN, 2009 WL 499105, \*7-8 (N.D. Ind. Feb. 26, 2009) (holding that a corporate successor to Uniroyal Holdings

year's survey period presented several key decisions. In Part I, we survey issues surrounding the Clean Air Act (CAA),<sup>3</sup> with several seminal cases in and around Indiana. In Part II, we discuss federal cases involving CERCLA and RCRA, including key U.S. Supreme Court guidance on joint and several liability. Part III examines cases under the Clean Water Act. In Part IV, this Article considers case law under state law. Finally, Part V examines opinions that may affect environmental insurance coverage cases under Indiana law.

## I. UPDATE ON ISSUES ARISING UNDER THE CLEAN AIR ACT

Cases involving the CAA produced noteworthy decisions, including a jury verdict and subsequent judgment in Indianapolis. For reference, we summarize the CAA regulatory context in Part A. We then discuss the appellate review of CAA permits as decided in *Sierra Club v. EPA*.<sup>4</sup> We devote substantial attention to the jury verdict and subsequent bench trial on remedies in *United States v. Cinergy Corp.*<sup>5</sup> This discussion concludes with an examination of two abstention cases and an additional challenge to EPA rulemaking.

### A. Regulatory Framework of the Clean Air Act

The CAA requires the EPA to set National Ambient Air Quality Standards (NAAQS) for pollutants found in ambient air because of stationary or mobile sources and that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare."<sup>6</sup> EPA has set NAAQS for the six pollutants, known as "criteria" pollutants: sulfur dioxide, particulate matter, carbon monoxide, ozone, nitrogen dioxide, and lead.<sup>7</sup> The CAA requires EPA to divide the country into areas and dub them as "non-attainment," "attainment," or "unclassifiable" for each pollutant. These categories indicate whether the area meets the NAAQS.<sup>8</sup>

---

was not liable for environmental clean-up expenses associated with its corporate predecessor because such liabilities were assigned via contract to another party); *United States v. Jupiter Aluminum Corp.*, No. 2:07-CV-262 PPS, 2009 WL 418091, \*6-7 (N.D. Ind. Feb. 18, 2009) (holding that technically achievable standards agreed to by a party in a consent decree will still apply even if the agreed technology or actions are more onerous than those that would apply in the absence of the consent decree); *American Chemical Service Site RD/RA Agreement Members v. Admiral Insurance Co.*, 396 B.R. 14, 1:08-cv-0741-RLY-JMS, 2008 WL 4615780, \*17-19 (S.D. Ind. Oct. 17, 2008) (holding that assignment of insurance policies by bankrupt company to a third party resolve liability for environmental clean-up was not, in itself, sufficient to grant jurisdiction over a coverage dispute between a third party and the insurers because the declaratory action was not related to the original bankruptcy).

3. 42 U.S.C. §§ 7401-7515 (2006).

4. 551 F.3d 1019 (D.C. Cir. 2008).

5. 618 F. Supp. 2d 942 (S.D. Ind. 2009).

6. Clean Air Act § 108(a)(ii)(A) and (B), 42 U.S.C. § 7408(a)(ii)(A) and (B) (2006).

7. 40 CFR §§ 50.4-50.12 (2009).

8. Clean Air Act § 107, 42 U.S.C. § 7407(c), (d) (2006).



Once EPA sets the NAAQS, each state must develop and submit to EPA for its approval a state implementation plan (SIP) that establishes how the state will meet the NAAQS for each criteria air pollutant.<sup>9</sup> The SIP must contain provisions that prohibit any source within the state from emitting a criteria air pollutant that will “contribute significantly” to non-attainment in, or interfere in maintenance by, any other state’s compliance with NAAQS.<sup>10</sup> EPA deems a state either in attainment with the NAAQS, meaning it meets the EPA-set pollutant level, or in non-attainment, meaning it does not meet the NAAQS.<sup>11</sup> Different programs apply to sources in areas based on whether they are in an area in attainment with the NAAQS.<sup>12</sup>

Besides requiring state compliance with NAAQS and each state’s SIP, the CAA also addresses individual air pollution sources through the regulation of specific industries. The CAA does so through New Source Performance Standards (NSPS) that require the installation of the “best available control technology” (BACT) for any new major source of air pollution within the designated industry<sup>13</sup> and the use of “reasonably available control technology” (RACT), after considering technological and economic feasibility, for existing major stationary sources of pollution in non-attainment areas.<sup>14</sup> The NSPS provides that major stationary sources and major sources implementing major modifications<sup>15</sup> are required to comply with standards set out in either the New Source Review (NSR) or Prevention of Significant Deterioration (PSD) permit programs.<sup>16</sup> NSR standards are applied to major sources in areas not in attainment with NAAQS; PSD standards are applied to major sources in areas where emissions are in attainment with NAAQs. The program’s goal is to reduce the aggregate level of criteria pollutants in non-attainment areas by preventing new pollution sources that are not offset by either the closing of or a reduction in pollution from an existing source.<sup>17</sup> The program seeks to maintain attainment status for each criteria pollutant in the area, thereby preventing any deterioration of air quality.<sup>18</sup>

The CAA addresses individual air pollution sources through the regulation of releases of hazardous air pollutants (HAPs)—less widely emitted, but highly

---

9. *North Carolina v. EPA*, 531 F.3d 896, 901-02 (D.C. Cir. 2008) (citing 42 U.S.C. §§ 7407(a), 7410 (2006)).

10. *North Carolina*, 531 F.3d at 902 (quoting 42 U.S.C. § 7410(a)(2)(D)(i)(1) (2006)).

11. *Id.* at 902.

12. *Id.* at 903.

13. Clean Air Act § 165(a)(4), 42 U.S.C. § 475(a) (2006).

14. Clean Air Act § 172(c)(1), 42 U.S.C. § 7502(c)(1) (2006).

15. A “modified” source is one that has any physical or process change that increases a criteria pollutant emission by more than a de minimis amount. Clean Air Act § 111(a)(4); 42 U.S.C. § 7411(a)(4) (2006).

16. Clean Air Act §§ 171-93, 160-69, 42 U.S.C. §§ 7501-7515, 7470-7492 (2006).

17. Clean Air Act § 160-69, 179-93, 42 U.S.C. §§ 7501-7515, 7509-7515 (2006).

18. *Id.*

dangerous, hazardous, or toxic pollutants not covered by the NAAQS or SIPs.<sup>19</sup> Section 112 of the CAA requires EPA to regulate the emissions of HAPs based upon either EPA or congressional determination that HAPs could cause serious health problems.<sup>20</sup> EPA deems over one hundred pollutants a HAP.<sup>21</sup> EPA is required to list all major HAP sources and establish emission standards<sup>22</sup> requiring the maximum degree of reductions in emissions, taking into consideration the cost and any non-air quality health and environmental impacts and energy requirements.<sup>23</sup> Once EPA has listed a HAP's facility source, the EPA has a limited ability to remove a source unless it determines that the source's emissions are adequate to protect public health and not harm the environment.<sup>24</sup>

*B. Hazardous Air Pollutants: Sierra Club v. EPA*<sup>25</sup>

In *Sierra Club*, an EPA-issued rule exempting major HAP sources "from normal emission standards during periods of startups, shutdowns, and malfunctions (SSM) and imposing alternative, and arguably less onerous requirements," was challenged and vacated.<sup>26</sup>

Under the CAA, EPA must establish an emission standard for each HAP requiring "the maximum degree of" emission reductions.<sup>27</sup> The CAA defines "emission standard" as

a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard.<sup>28</sup>

Also relevant is the Title V permit, which, among other things, requires sources to certify compliance with the applicable requirements in the permit and to report

---

19. Clean Air Act § 112, 42 U.S.C. § 7412 (2006).

20. *Id.*

21. *Sierra Club v. EPA*, 551 F.3d 1019, 1021 (D.C. Cir. 2008).

22. The CAA defines "emission standard" as

a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.

Clean Air Act § 302(k), 42 U.S.C. § 7602(k) (2006).

23. *Sierra Club v. EPA*, 551 F.3d 1019, 1027-28 (D.C. Cir. 2008) (citing 42 U.S.C. § 7412(d) (2006)).

24. Clean Air Act § 112(c)(9), 42 U.S.C. § 7412(c)(9) (2006).

25. *Sierra Club*, 551 F.3d 1019.

26. *Id.* at 1021.

27. *Id.* (citing 42 U.S.C. § 7412 (2006)).

28. *Id.* (citing 42 U.S.C. § 7602(k)).



any deviations from compliance.<sup>29</sup> The Title V permit also creates a “permit shield” for sources that comply with the permit, deeming them in compliance with the other CAA provisions.

Four decades ago, the EPA introduced the concept of an exemption from emission standards during SSM under section 111 of the CAA. EPA granted an exemption during SSM, but created what is referred to as the “general duty” standard, in which EPA requires that at all times owners and operators, to the extent practicable, must maintain and operate any affected facility and air pollution control equipment in a manner consistent with good air pollution control practices. EPA later extended the SSM exemption to cover section 112 HAPs as well, such that only the general duty of good practices would apply. This extension required that each source develop and implement an SSM plan which would be subject to EPA review and approval and incorporated into the source’s Title V permit. Because the SSM plan was available for public comment and incorporated into the Title V permit, it was part of the permit shield. In the SSM plan, a source was to demonstrate how it would meet the “general duty” even during periods of SSM, describing the procedures for operating and maintaining a source during SSM and a program for correcting any malfunctioning process and air pollution control equipment.<sup>30</sup>

In a 2002 rule amendment, EPA removed the requirement that the SSM be in the Title V permit and instead required the Title V permit to require the source to adopt and follow an SSM.<sup>31</sup> EPA also removed the requirement that the SSM plan be made publicly available only upon request. This meant that the SSM was no longer part of the permit shield. The EPA faced a challenge to this rule revision and agreed to make the source produce the SSM plan to the permitting authority along with the Title V application, but in 2003 relaxed this requirement and again made the SSM plan be produced only upon request.<sup>32</sup> In 2006, EPA made yet another rule revision and removed the requirement that sources implement the SSM plan during the SSM periods, stating that plan specifics are not applicable requirements under Title V and therefore do not have to be followed, but at any rate the general duty would still apply.<sup>33</sup> Under the 2006 revision, EPA no longer had to obtain copies of the SSM plan after public request; the public could only access those SSM plans obtained by the permitting authority at its own discretion.<sup>34</sup>

Sierra Club challenged the 2002, 2003, and 2006 rules as unlawful, arbitrary, and failing to assure Title V compliance.<sup>35</sup> EPA contended that the Sierra Club waived its challenge to the exemption by not challenging the 1994 rule, which set

---

29. *Id.* at 1022.

30. *Id.*

31. *Id.* at 1023.

32. *Id.* (citing 66 Fed. Reg. 16,318, 16,326 (Mar. 23, 2001)).

33. *Id.* (citing 70 Fed. Reg. 43,992, 43,994 (July 29, 2005)).

34. *Id.*

35. *Id.* at 1024.

forth the general duty standard for SSM events.<sup>36</sup> Sierra Club argued that the reopening doctrine applies and a challenge is proper.

The reopening doctrine provides that “the time for seeking review starts anew where the agency reopens an issue ‘by holding out the unchanged section as a proposed regulation, offering an explanation for its language, soliciting comments on its substance, and responding to the comments in promulgating the regulation in its final form.’”<sup>37</sup> However,

when the agency merely responds to an unsolicited comment by reaffirming its prior position, that response does not create a new opportunity for review. Nor does an agency reopen an issue by responding to a comment that addresses a settled aspect of some matter, even if the agency had solicited comments on unsettled aspects of the same matter.<sup>38</sup>

The court found that although EPA did not have an actual reopening of the 1994 rule, there was a “constructive reopening.”<sup>39</sup> The changes EPA made to the SSM plan requirements were significant, and essentially “eliminated the only effective constraints that EPA originally placed on the SSM exemption.”<sup>40</sup> The court found that although the general duty remained unchanged, the “stakes of judicial review” were significantly altered in that the general standard may not have been worth challenging in 1994 because of the SSM plan requirements at that time, but the relaxation of these requirements put new significance on the general duty’s importance.<sup>41</sup> The court found that a constructive opening occurred and the challenge was timely.<sup>42</sup>

The court then turned to the Sierra Club’s claim that the EPA’s exemption of major sources from compliance with emission standards during SSM events is contrary to the CAA and arbitrary and capricious.<sup>43</sup> The court looked to *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*<sup>44</sup> to review the EPA’s rule, as well as the CAA, which provides that the court may reverse agency actions found “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>45</sup>

According to the Sierra Club, the SSM exemption was contrary to the CAA definition of emission standard, which requires an emission to be controlled on a continuous basis, because the SSM exemption excuses a source from

---

36. *Id.*

37. *Id.* (citing to *Am. Iron & Steel Inst. V. EPA*, 866 F.2d 390, 397 (D.C. Cir. 1989)).

38. *Id.* (citing *Kennecott Utah Copper Corp. v. Dep’t of Interior*, 88 F.3d 1191, 1213 (D.C. Cir. 1996)).

39. *Id.* at 1025.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 1026.

44. 467 U.S. 837 (1984).

45. *Sierra Club*, 551 F.3d at 1027 (citing 42 U.S.C. § 7607(d)(9)(A) (2006)).



compliance during such events, which would not result in continuous compliance.<sup>46</sup> EPA responded that the general duty would apply during SSM events and would require the source to meet emission limits. However, the court determined that the general duty standard is not a section 112 compliant standard and because this is the only standard that applies during SSM events, the SSM exemption violates the CAA requirement that a section 112 emission standard apply continuously.<sup>47</sup>

There was a dissenting opinion filed in this case which disagreed that the court had jurisdiction to hear the challenge.<sup>48</sup> The dissent argued that the EPA did not alter the SSM exemption during the subsequent rulemaking, it simply changed the requirements for the SSM plan. Therefore, any challenge to the SSM exemption should have been brought in 1994 when the agency first promulgated the exemption.<sup>49</sup> According to the dissent, the Sierra Club should have filed a request to EPA to rescind the regulation, which EPA would deny. Sierra Club could then challenge EPA's denial and raise the issue.<sup>50</sup>

### C. New Source Review Regulations: *United States v. Cinergy Corp.*

During the survey period, in *United States v. Cinergy Corp.* the U.S. District Court for the Southern District of Indiana issued a series of opinions<sup>51</sup> pertaining to the relief available to the government for permit violations under the NSR Program of the CAA. Here the United States, and other plaintiffs,<sup>52</sup> alleged that Cinergy violated the NSR provisions of the CAA when it made physical changes, each constituting a "major modification,"<sup>53</sup> to coal-fired boiler units at several of

---

46. *Id.*

47. *Id.* at 1028

48. *Id.* at 1028-29 (Randolph, J., dissenting).

49. *Id.* at 1029.

50. *Id.* at 1029-30.

51. Two of the opinions issued by the Court during the survey period will be discussed in this section, *United States v. Cinergy Corp.*, 582 F. Supp. 2d 1055 (S.D. Ind. 2008) and *United States v. Cinergy Corp.*, 618 F. Supp. 2d 942 (S.D. Ind. 2009). The Court issued five other opinions in the matter that this Article will not address in detail. See 2009 U.S. Dist. LEXIS 44181 (S.D. Ind. Apr. 24, 2009) (ruling regarding motions in limine regarding expert and witness testimony or both); 2009 U.S. Dist. LEXIS 44179 (S.D. Ind. Apr. 24, 2009) (regarding motions in limine seeking expert testimony exclusion); 2009 WL 126231 (S.D. Ind. Jan. 12, 2009) (granting plaintiffs' motion for new trial due to Cinergy's failure to correct expert witness's testimony regarding employment status to include contract with Cinergy, while finding a lack of evidence to Cinergy's counsel); 2009 WL 77680 (S.D. Ind. Jan. 9, 2009) (ruling on various motions in limine); 2009 WL 94515 (S.D. Ind. Jan. 7, 2009) (denying plaintiff summary judgment motion); 1:99-CV-1693-LJM-JMS, 2008 U.S. Dist. LEXIS 104928 (S.D. Ind. Dec. 30, 2008) (regarding plaintiff's motion to compel).

52. New York, New Jersey, and Connecticut, the Hoosier Environmental Council, and the Ohio Environmental Council, intervened in the lawsuit. See *Cinergy Corp.*, No. 1:99-CV-LJM-JMS, 2007 U.S. Dist. LEXIS 76941, at \*4 (S.D. Ind. Sept. 28, 2007).

53. A major modification consists of any physical change that would result in a significant

its facilities in Indiana and Ohio without first obtaining a permit as required by the CAA.<sup>54</sup> Particularly, at issue were Cinergy's modifications at its Wabash Valley plant<sup>55</sup> and Beckjord plant.<sup>56</sup> In this regard, Cinergy, in the mid-1980s, began assessing whether it was more cost-effective to "refurbish" the units at its plants or to replace them with new units.<sup>57</sup> Cinergy's "refurbishment plan" had the "ultimate goal . . . to extend the life of existing generating plants so as to defer the need to build new, costly generating units."<sup>58</sup>

1. *Procedural Background*.—In 2007, the court ruled that Cinergy had violated the terms of a 1998 settlement contract between Cinergy and EPA. The contract, effective from 1998 to 2000, was subject to the provisions of the Ohio SIP that established limits on particulate matter (PM) emissions at Cinergy's Beckjord plant.<sup>59</sup> Specifically, the court found that Cinergy exceeded PM emissions limits on October 12, 1999; October 21-22, 1999; May 4, 2000; and May 26, 2000.<sup>60</sup> In addition, the court concluded that Plaintiffs could hold each party liable under the two sets of obligations because the duties under the EPA settlement contract and Ohio SIP were essentially separate.<sup>61</sup>

In May 2008, the court held a jury trial regarding the claims that Cinergy violated the NSR provisions of the CAA when it performed certain work on its coal-fired boiler units at several of its Indiana and Ohio facilities without a permit.<sup>62</sup> The jury returned a verdict for the Plaintiffs in May 2008 and found that Cinergy violated the CAA by failing to obtain permits for four of its Wabash Valley plant projects.<sup>63</sup> The jury found that "a reasonable power plant owner or operator would have expected" a net increase of forty-plus tons in SO<sub>2</sub> emissions, NO<sub>x</sub> emissions, or both, as a "proximate result" of the Wabash River refurbishment projects at three units.<sup>64</sup>

2. *Remedies for Cinergy's Violations*.—In response to the unfavorable liability decisions, Cinergy filed a partial summary judgment motion in which

---

net emissions increase of a pollutant covered by the CAA. See 40 C.F.R. § 52.21(a)-(b)(2)(1) (2009).

54. See *Cinergy Corp.*, 2007 U.S. Dist. LEXIS 76938, at \*4.

55. Cinergy's Wabash River plant is located in Vigo County, Indiana, near the City of Terre Haute, Indiana. *Cinergy Corp.*, 618 F. Supp. 2d at 945.

56. The Beckjord plant is located in Beckjord, Ohio, and is subject to an Ohio State Implementation Plan ("SIP") establishing particulate matter emissions limits. *Id.* at 944.

57. *Cinergy Corp.*, 618 F. Supp. 2d at 945.

58. *Id.* (citations omitted).

59. See *Cinergy Corp.*, 618 F. Supp. 2d at 957; *Cinergy Corp.*, No. 1:99-cv-1693-LJM-JMS, 2007 U.S. Dist. LEXIS 76938 (S.D. Ind. Sept. 28, 2007).

60. *Cinergy Corp.*, 618 F. Supp. 2d at 957.

61. *Id.*

62. See *id.* at 944.

63. See *id.* The district court later ordered retrial on ten of the Plaintiffs' claims, and retrial took place in May 2009; see also *United States v. Cinergy Corp.*, No. 1:99-cv-1693-LJM-JMS, 2009 U.S. Dist. LEXIS 1886 (S.D. Ind. Jan. 12, 2009).

64. *Cinergy Corp.*, 618 F. Supp. 2d at 945-46.



Cinergy sought to limit the government's relief.<sup>65</sup> Cinergy claimed that the scope of relief available under NSR was limited to prospective relief, such as additional limitations on future emissions and did not include "remediation for past health and environmental effects."<sup>66</sup> The government disagreed and sought both prospective relief for the violations. First, prospective relief to reduce emissions and retrospective through installing state-of-the-art pollution controls and obtaining any necessary permits. Second, retrospective relief to further reduce pollution beyond what is required for prospective compliance to "make up for" the past pollution caused by the violations.<sup>67</sup>

Cinergy argued that relief under NSR should be limited to prospective relief by claiming the language in section 313 of the CAA,<sup>68</sup> allowing for "any other appropriate relief," should be read as limiting relief only to those provided for in that section.<sup>69</sup> In this regard, Cinergy contended that the legislative history pertaining to the remedies available under the CAA did not authorize retrospective remediation because Congress relied in part on RCRA, which does not permit retrospective relief to address violations.<sup>70</sup> Finally, Cinergy argued that the costs of retrospective relief in terms of financial costs and judicial economy were too great and should be precluded because the government had failed to specifically mention these types of remedial measures in its brief.<sup>71</sup>

Cinergy's arguments did not persuade the court. The court denied Cinergy's motion for partial summary judgment, holding that the relief available was not limited to prospective relief as the court could order any other appropriate relief.<sup>72</sup> In this regard, the court concluded that "unless otherwise specified by statute, a court has the equitable authority to order a full and complete remedy for harms caused by a past violation, and in doing so may go beyond what is necessary for compliance with the statute."<sup>73</sup> The court further noted that section 113 of the CAA authorizes the district court to "restrain [a] violation [of the CAA], to require compliance, to assess [a] civil penalty, to collect any fees owed to the United States" and award appropriate relief.<sup>74</sup> Ordering Cinergy to "remedy, mitigate, and offset" the harms it caused gave effect to the CAA's purpose "to protect and enhance the quality of the Nation's air resources so as to promote the

---

65. *United States v. Cinergy Corp.*, 582 F. Supp 2d. 1055, 1057 (S.D. Ind. 2008).

66. *Id.*

67. *Id.* at 1057-58.

68. Section 113 of the CAA authorizes the district court to "restrain [a] violation [of the CAA], to require compliance, to assess [a] civil penalty, collect any fees owed the United States . . . and to award any other appropriate relief." Clean Air Act § 113(b)(3), 42 U.S.C. 7413(b)(3) (2006).

69. *Cinergy Corp.*, 582 F. Supp 2d. at 1063.

70. *Id.* at 1059, 1064-65 (citing *Meghrig v. KFC W., Inc.* 516 U.S. 479, 484 (1996)).

71. *Id.* at 1066.

72. *Id.* at 1060.

73. *Id.* at 1061-62 (citations omitted).

74. *Id.* at 1058 (quoting 42 U.S.C. 7413(b) (2006)).

public health and welfare.”<sup>75</sup> Accordingly, the court held that its equitable authority under section 113(b) included ordering relief redressing the harms Cinergy’s violations caused.<sup>76</sup>

Subsequently, in February 2009, the court presided over a bench trial on the proper remedy for the violations found by the court at Beckjord, and by a jury at Wabash River.<sup>77</sup> On May 29, 2009, the court issued its order setting out the remedy for Cinergy’s CAA violations at its Beckjord and Wabash River facilities.<sup>78</sup>

With regard to the Beckjord plant, the court found that Cinergy exceeded PM emissions limits on several occasions.<sup>79</sup> The court noted that it was undisputed that: 1) as a result of the PM emissions tests failure of October 12, 1999; May 4, 2000; and May 26, 2000; unit 1 at Beckjord was not in compliance for twenty-three days; and 2) unit 2 was not in compliance for two days in October 1999 as a result of PM emissions test failures.<sup>80</sup> Furthermore, Plaintiffs presented evidence at the remedy phase trial about additional PM emissions test failures at Beckjord: that unit 1 failed another PM emissions test in October 2003 and that unit 2 failed a PM emissions test in April 2006.<sup>81</sup>

In light of this evidence, the Plaintiffs asserted that the appropriate remedy for Cinergy’s violations at Beckjord units 1 and 2 was for Cinergy to install a compliance measurement tool and pay the statutory maximum penalty of \$1.32 million.<sup>82</sup> Plaintiffs argued that such a penalty comported with the purposes of the CAA’s penalty provisions, which include retribution, deterrence, and restitution.<sup>83</sup> Plaintiffs reasoned that none of the evidence justified anything but the maximum penalty.<sup>84</sup>

In contrast, Cinergy argued that the maximum penalty was “not warranted because of its good faith efforts to comply with its permit obligations.”<sup>85</sup> Specifically, Cinergy argued that: 1) as soon as it became aware of a violation, it shut the unit down, hired inspectors, and made the inspector’s recommended repairs and changes; 2) Cinergy spent significant time and money assessing the proper changes; and 3) by addressing the problems quickly, the company minimized the violations’ seriousness. Cinergy also argued that Plaintiffs

---

75. *Id.* at 1061-62 (citation omitted).

76. *Id.* (“In other words, this Court’s equitable authority is not limited to providing prospective relief only.”).

77. *Cinergy Corp.*, 618 F. Supp. 2d at 944-45.

78. *Id.* In the remedy order, the district court noted that the court had previously concluded that Cinergy exceeded the limits established for particulate matter emissions at its Beckjord Plant by order dated September 28, 2007. *See Cinergy Corp.*, 2007 U.S. Dist. LEXIS 76938, at \*5.

79. *Cinergy Corp.*, 618 F. Supp. 2d at 957.

80. *Id.* at 955-57.

81. *Id.* at 957-60.

82. *Id.* at 969 (citation omitted).

83. *Id.* (citing *Tull v. United States*, 481 U.S. 412, 422 (1987)).

84. *Id.*

85. *Id.*



improperly “sought a double penalty for identical violations of the Ohio SIP and . . . at Beckjord unit 1.”<sup>86</sup>

The court ordered Cinergy to pay a penalty in the amount of \$687,500,<sup>87</sup> and to install a particulate matter continuous emissions monitor on Beckjord units 1 and 2 as soon as practical.<sup>88</sup> In reaching this conclusion, the court noted that the statutory maximum penalty should apply to Cinergy’s violation of the Ohio SIP, but additional recovery under the Administrative Order would not serve the “interests of justice.”<sup>89</sup> The court further noted that it took Cinergy, in many cases, years to implement key changes to the units despite “a history of successive failures.”<sup>90</sup> Furthermore, Cinergy’s testing methods did not consist of “continuous monitoring” and therefore did not account for the potential that Cinergy violated the Ohio SIP at other times during which no test was performed.<sup>91</sup> As such, ordering Cinergy to pay the maximum daily penalty for all violations under the Ohio SIP served the retribution, deterrence, and restitution purposes of the CAA penalty provisions. The court went on to hold that “[t]here is little doubt that the harm caused by violation of emissions limits is irreparable” and that “monetary penalties cannot deter completely the harm caused by Cinergy’s multiple violations of emissions limits.”<sup>92</sup> As a result, continuous emissions monitoring on Beckjord units 1 and 2 for compliance purposes was necessary to ensure that Cinergy complied with the Ohio SIP.<sup>93</sup>

With regard to the Wabash Valley plant, the Plaintiffs asserted that “significant and irreparable harm to the environment had resulted from emissions from Wabash Valley units 2, 3, and 5.”<sup>94</sup> As such, the Plaintiffs argued “for: (1) the immediate shutdown of Wabash River units 2, 3, and 5; and (2) mitigation of the excess emissions from Wabash River units 2, 3, and 5, by (a) installation of BACT on Wabash River units 4 and 6 (or retirement of unit 4); and (b) over a twenty-year period, surrender of SO<sub>2</sub> allowances corresponding to the total SO<sub>2</sub>

---

86. *Id.*

87. *Id.* at 971. To arrive at this amount, the court multiplied \$27,500 (the statutory maximum penalty per day violation) by twenty-five, which equaled the number of days Cinergy exceeded limits established for particulate matter emissions at Beckjord units 1 and 2. *Id.*

88. *Id.* The parties agreed that PM continuous emissions monitors (“PM CEMS”) should and could be installed on Beckjord units 1 and 2. *Id.* at 958, 970-71.

89. *Id.* at 969-70 (citing *United States v. B&W Inv. Props.*, 38 F.3d 362, 368 (7th Cir. 1994)); see U.S.C. § 7413(e)(1) (2006) (noting that Court should take into account several factors when setting penalty)). A penalty may be assessed for each day of violation. *Id.* § 7413(e)(2).

90. *Cinergy Corp.*, 618 F. Supp. 2d at 969-70.

91. *Id.* at 970.

92. *Id.* at 970-71.

93. *Id.*

94. *Id.* at 960. “The irreparable harm includes significant PM<sub>2.5</sub> effects that extend throughout the Midwest and into the Eastern states of New York, New Jersey and Connecticut; ground-level ozone effects in the same regions; acid rain deposition effects in the forested areas of the Midwest; and mercury effects within a 250-mile area of the Wabash River plant.” *Id.* at 960, 948-59.

excess emissions.”<sup>95</sup> Although closure of Wabash River units 2, 3, and 5, would have an immediate positive impact on the health effects from those emissions, Plaintiffs argued that “additional future reductions in the same airshed [were] necessary to balance out the pollution that Cinergy never would have emitted if it had followed the law.”<sup>96</sup> In addition, Plaintiffs claimed that “surrender of SO<sub>2</sub> allowances in an amount equal to the total SO<sub>2</sub> excess emissions, with the total allowance surrender coming prior to 2029,” was necessary “to ensure that reductions taken at Wabash River units 4 and 6, do not result in increased emissions elsewhere.”<sup>97</sup>

In contrast, Cinergy claimed “that the most equitable remedy was for Cinergy to retire the units [2, 3, and 5] in 2012,” and that in the interim, these units be operated “at a rate approximately equivalent to the pre-project emissions levels, or the Rosen baseline levels.”<sup>98</sup> Cinergy also claimed that “because Plaintiffs dropped their claims against Cinergy for any violations at Wabash River units 4 and 6, . . . the Plaintiffs should not be allowed to achieve through mitigation what they chose not pursue in court,” i.e., use a remedy for violations at units 2, 3, and 5 to control pollution at units 4 and 6.<sup>99</sup> Instead, any requirement to mitigate any “excess emissions,” would be accomplished by the retirement of units 2, 3, and 5.<sup>100</sup>

After considering the parties’ arguments, the court ordered Cinergy to 1) shut down units 2, 3, and 5 of the Wabash River Plant no later than September 30, 2009; 2) run units 2, 3, and 5 at a rate that does not exceed the Rosen baseline emissions until the time said units are shut down; and 3) permanently surrender sulfur dioxide emission allowances in an amount equal to the amount of sulfur dioxide emissions from units 2, 3, and 5 from the period beginning on May 22, 2008 through shutdown of those units on September 30, 2009.<sup>101</sup> In reaching this conclusion, the court noted that Cinergy had emitted excess emissions of SO<sub>2</sub> totaling 359,000 tons, and of NO<sub>x</sub> totaling 4,865 tons.<sup>102</sup> The court further pointed out that at the time of the projects, the Wabash River plant was in a nonattainment area with respect to SO<sub>2</sub> emissions and in an attainment area with respect to NO<sub>x</sub> emissions.<sup>103</sup> As such, if Cinergy had applied for a permit, as it was required, it would have been required to install lowest achievable emissions rate (LAER) technology<sup>104</sup> for each of the Wabash River projects with respect to SO<sub>2</sub> and BACT for its NO<sub>x</sub> emissions.<sup>105</sup> Furthermore, the evidence of

---

95. *Id.* at 960.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 961.

100. *Id.*

101. *Id.* at 964-65, 967.

102. *Id.* at 962-63.

103. *Id.* at 946-49, 963.

104. *Id.* at 946-47.

105. *Id.* at 948, 960-61.



environmental harm from non-permitted SO<sub>2</sub> emissions and, to a lesser extent, NO<sub>x</sub> emissions, compelled a finding of irreparable injury for which there is no adequate remedy at law.<sup>106</sup> As such, a relatively quick shutdown of the units was necessary.<sup>107</sup>

*D. The Abstention Doctrine: Federal Court Review of CAA Claims  
When Substantially Similar CAA Decisions by IDEM  
Are Pending Review by the State*

In *Sierra Club v. Duke Energy, Inc.*,<sup>108</sup> the Sierra Club sued Duke Energy, Indiana, Inc., pursuant to the citizen suit provision of the CAA,<sup>109</sup> claiming that Duke had improperly modified an existing Indiana plant in violation of the CAA and that IDEM had improperly erred in granting Duke a minor source permit for its facility modifications.<sup>110</sup> In particular, the Sierra Club claimed that IDEM departed from the PSD program guidelines when issuing the permit to Duke and erred in determining that Duke's proposed action constituted an environmental improvement over the existing facility based on the improper assumption that thirteen past improvements by Duke to this same facility were legally done.<sup>111</sup> The Sierra Club contended these thirteen prior modifications were improper, unpermitted, major modifications that placed the facility in total violation of the PSD program, precluding approval of any new modifications by IDEM until Duke fixed prior errors. Duke disputed these arguments, and claimed that the federal district court should abstain from hearing the case because Indiana's Office of Environmental Adjudication (OEA) had not issued a final decision on a separate appeal pending before the OEA that the Sierra Club filed on these issues.<sup>112</sup>

In rejecting Duke's claim that the court should abstain from hearing the lawsuit, the court first noted that the issues pending before the OEA did not sufficiently overlap with the issues currently before the court.<sup>113</sup> In this regard,

---

106. *Id.* at 961. Potential affects included "decreased lung function, increased prevalence of respiratory symptoms, worsened respiratory infections, heart attacks, and early death." *Id.* at 963.

107. *Id.* at 963-67.

108. *Sierra Club v. Duke Energy, Inc.*, No. 1:08-cv-0437-SEB-TAB, 2009 WL 363174, 2009 U.S. Dist. LEXIS 10472 (S.D. Ind. Feb. 11, 2009).

109. 42 U.S.C. § 7604 (2006).

110. *Id.* at \*1-2.

111. *Id.*

112. *Id.* at \*2-3. The abstention doctrine, relied on by Duke, was set out in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and provides that if a district court finds that a station action that is parallel to the federal action before the district court, the court must decide whether to abstain from exercising jurisdiction. See *Schneider Nat. Carriers, Inc. v. Carr*, 903 F.2d 1154, 1156 (7th Cir. 1990). The Supreme Court, applying its holding in *Burford*, set forth the specific circumstances under which a federal court must abstain in *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350, 358-59 (1989).

113. *Sierra Club*, 2009 WL 363174 at \*3-4.

the court pointed out that the OEA appeal involved a challenge by the Sierra Club to IDEM's reliance on existing emissions levels at the plant to calculate probable changes in emissions to justify a new modification; whereas the issue before the District Court was whether Duke had violated the CAA by failing to obtain permits for previous modifications to its plant that preceded the current plant modification being disputed before the OEA.<sup>114</sup> In other words, the court would be looking at whether Duke had engaged in "historic, unlawful modifications" at the plant while the OEA would be looking at whether IDEM had properly determined if Duke could construct a new generating unit at the plant under the PSD program.<sup>115</sup> Furthermore, the court held that its review of the Sierra Club's claims did not involve any difficult questions of state law because the modifications at issue took place when the EPA, and federal regulations, were directly responsible for regulating the PSD program in Indiana.<sup>116</sup> As such, a ruling by the court would not interfere with state policy because the CAA and federal regulations require Indiana to implement air quality standards laid out by the EPA.<sup>117</sup> The court similarly rejected Duke's request for a stay until a ruling was issued in the appeal pending before the OEA, particularly because the issue before the District Court involved a question of federal law, and the CAA was about rectifying past wrongs.<sup>118</sup>

Similarly, the U.S. District Court for the Northern District of Indiana in *Natural Resource Defense Council, Inc. v. BP Products North America, Inc.*,<sup>119</sup> held that it would abstain from hearing claims brought by a party if those exact claims were pending review before the OEA. In that case, the Natural Resource Defense Council, Inc. (NRDC) sued BP Products North America, Inc. to contest the legality of modifications BP made to its oil refinery located in Whiting, Indiana, pursuant to a "minor source" IDEM permit.<sup>120</sup> In particular, the NRDC claimed that it was improper for IDEM to grant BP a "minor source" permit because BP's modifications would actually cause air pollution emissions that required a major source permit, that IDEM had been "duped" as to this fact, and that BP had improperly begun modifying its facility before it obtained any permit in violation of the CAA.<sup>121</sup> BP asserted that the district court did not have jurisdiction to hear the case, or in the alternative, should stay any decision until a decision was issued by the OEA with regard to an appeal by other environmental groups that involved claims that substantially mirrored the

---

114. *Id.* at \*4.

115. *Id.*

116. *Id.* at \*4-5.

117. *Id.* at \*5.

118. *Id.* at \*6-7.

119. *Natural Res. Def. Council, Inc. v. BP Prods. N. Am., Inc.*, No. 2:08-CV-204 PS, 2009 WL 1854527, 2009 U.S. Dist. LEXIS 54363 (N.D. Ind. June 26, 2009).

120. *Id.* at \*1. BP requested "a 'minor source' permit because it claimed its modifications would not trigger the more rigorous restrictions of the [CAA]." IDEM agreed and issued the permit. *Id.* at \*1-2.

121. *Id.* at \*1, 4-5.



NRDC's claims pending before the district court.<sup>122</sup>

In holding that it would abstain from hearing the two claims set out in the NRDC's complaint pertaining to whether IDEM's issuance of a "minor source" permit for BP's extra heavy crude project was proper, the court stated that NRDC's allegations with respect to these claims were "nearly identical to the" claims in the appeal currently pending before the OEA.<sup>123</sup> The court held that an OEA de novo review of an IDEM permit decision was a specialized proceeding necessary for *Burford* abstention, particularly where the same issues were pending appeal before the OEA.<sup>124</sup> In this regard, the court pointed out that proceeding to hear these two claims would require the district court to second guess the expert state agency's decision as to a state-issued permit and would improperly frustrate the state's efforts to establish a coherent environmental policy.<sup>125</sup> But at the same time, the district court ruled that it would exercise jurisdiction over the NRDC's claim that BP violated the CAA for alleged construction activities at the plant undertaken without a permit from 2005 through 2008.<sup>126</sup> In this regard, the court noted that this claim involved alleged actions taken by BP that were taken before IDEM issued the permit currently in dispute before the OEA, that were the subject of notice of violation findings by the EPA, and did not overlap with issues pending before the OEA.<sup>127</sup>

As such, following the decisions in *Sierra Club v. Duke Energy, Inc.* and *Natural Resources Defense Council, Inc. v. BP Products North America, Inc.*, whether a plaintiff will be able to challenge a permit decision in federal court by IDEM while a simultaneous OEA appeal for that same facility is pending will depend on whether the claims pending before the OEA do not substantially overlap with the claims raised at the district court level.<sup>128</sup>

#### *E. Revising the Ozone NAAQS: Natural Resources Defense Council v. EPA*

In 1997, the EPA revised the NAAQS for ozone from a one-hour standard to an eight-hour standard, and began rulemaking to implement this new standard.<sup>129</sup> Phase II of the rules was final in 2005; however, EPA published a Reconsideration Notice for the Phase II rule in 2007. The NRDC challenged the portions of the Phase II rule, including those that allowed facilities in nonattainment areas (those areas not meeting NAAQS standards for a particular pollutant) to achieve emission reductions by using RACT, the review of new

---

122. *Id.* at \*1-2.

123. *Id.* at \*1, \*5.

124. *Id.* at \*1, \*8, \*10-14.

125. *Id.* at \*1, \*8-14.

126. *Id.* at \*6.

127. *Id.* at \*4-6.

128. See, e.g., *Natural Res. Def. Council*, No. 2:08-CV-204 PS, 2009 WL 1854527, at \*6 (N.D. Ind. June 26, 2009); *Sierra Club v. Duke Energy, Inc.*, No. 1:08-CV-0437-SEB-TAB, 2009 WL 363174, at \*3 (S.D. Ind. Feb. 11, 2009).

129. 571 F.3d 1245, 1250 (D.C. Cir. 2009).

sources of pollution, and provisions implementing the statutory requirement that a SIP for a nonattainment area could provide for specific emission reductions and for certain contingency measures.<sup>130</sup> In regards to RACT, the NRDC challenged the portion of the rule, which it contended allows a state to not consider RACT in all nonattainment areas. Specifically, the rule states that nonattainment areas “shall meet the RACT requirement by submitting an attainment demonstration SIP demonstrating that the area has adopted all control measures necessary to demonstrate attainment as expeditiously as practicable.”<sup>131</sup> The court found that EPA’s interpretation of the rule was appropriate in light of the text of the CAA, which requires all nonattainment areas to achieve reasonably available control measures (which the court found analogous to RACT) as expeditiously as practicable, including any reductions that may be available at a minimum through RACT.<sup>132</sup> To the extent an area is already achieving attainment as expeditiously as possible, implementing additional controls through RACT would not hasten compliance and therefore may not be necessary.<sup>133</sup>

The NRDC also took issue with EPA allowing sources to use RACT approved under the one-hour standard to satisfy RACT under the eight-hour standard because RACT changes over time.<sup>134</sup> The court, however, found EPA’s approach sufficient because the EPA performs the RACT analysis on a case-by-case basis. EPA requires states to consider available information in addition to guidance documents on control technologies available, when submitting RACT certifications states must provide support documentation, and states and EPA are required to consider additional information provided to them under any notice and comment rulemaking (which is part of the SIP process).<sup>135</sup> All of these mechanisms would ensure that EPA would be required to make a case-by-case determination regarding RACT that would include any new technology and its decision to not revise its RACT guidelines was reasonable.<sup>136</sup>

The NRDC also challenged the portion of the rule allowing a state to forego a NO<sub>x</sub> RACT analysis for sources subject to the state’s emission cap and trade program if that program meets the NO<sub>x</sub> SIP Call requirements.<sup>137</sup> Specifically, the rule provided that the state need not perform or submit a NO<sub>x</sub> RACT analysis for sources subject to the state’s emission cap-and-trade program where that program meets the NO<sub>x</sub> SIP Call requirements. But under the CAA, reductions in emissions for RACT purposes must come from sources within the nonattainment area, not regionally as may be the case under the NO<sub>x</sub> SIP Call.

---

130. *Id.* at 1251.

131. *Id.* at 1252.

132. *Id.* (citing Clean Air Act § 172(c)(1)).

133. *Id.*

134. *Id.* at 1253-54.

135. *Id.* at 1254.

136. *Id.* at 1255.

137. *Id.* at 1256. The NO<sub>x</sub> SIP Call is a cap and trade program regulating NO<sub>x</sub> emissions whereby states can meet their emission targets by installing controls or by purchasing allowances from other sources located in the area covered by the NO<sub>x</sub> SIP Call.



Therefore, the EPA's determination that compliance with the NO<sub>x</sub> SIP Call could satisfy the NO<sub>x</sub> RACT requirement was inconsistent with the CAA and the court remanded this section of the rule.<sup>138</sup>

Phase II also impacted issues regarding NSR. Specifically, under NSR, a permit may be issued for a new or modified source in a nonattainment area only if sufficient off-setting emission reductions are obtained or if the source will comply with lowest achievable emission rates.<sup>139</sup> The new rule allowed new and modified sources to meet the NSR off-setting requirement by using credits from sources that shut down or ended operations as far back as 1977.<sup>140</sup> The NRDC challenged the policy of allowing offsetting, which the court rejected as untimely because this policy had been in place since the late 1980s and the time to challenge had passed. But the court did find that EPA acted arbitrarily in eliminating an attainment demonstration requirement from NSR permit in non-attainment areas because it did not provide any other safeguard to ensure emission reductions would be achieved upon commencement of operations, and not "sometime down the road."<sup>141</sup> Also challenged was whether EPA acted improperly in waiving an eighteen-month time limit under which permits could be issued in a state while the SIP was being approved.<sup>142</sup> The court held that relaxing this time limit constituted "anti-backsliding" because it allowed for waiver of NSR for an unlimited time pending SIP approval, which is less stringent than limiting the waiver to eighteen months.<sup>143</sup> The court remanded the rule back to EPA for further consideration of the foregoing provisions.<sup>144</sup>

## II. DEVELOPMENTS IN FEDERAL REGULATION OF RCRA AND CERCLA

Several opinions within the survey period address CERCLA and RCRA. The U.S. Supreme Court endorsed apportionment of CERCLA liability and rejected arranger liability for certain defendants. The Southern District of Indiana has already confronted the Court's new apportionment decision and applied its theory to complex environmental litigation involving numerous parties. Finally, this Part's opinions discuss whether costs were recoverable, the disclosure of damages, and the sanctionability of discovery violations.

---

138. *Id.* at 1258.

139. *Id.* at 1263-64.

140. *Id.* at 1264.

141. *Id.* at 1266. In making the emission off-set analysis, EPA requires the permitting agency to ensure the offsetting reductions will be in place by the time the source begins operations. *Id.* at 1263.

142. *Id.* at 1271. Under NSR, a state is required to implement NSR regulations into their SIP programs, and in areas of non-attainment, the EPA developed interim NSR regulations to apply with the state SIP was being finalized.

143. *Id.*

144. *Id.*

A. Burlington Northern: *CERCLA Liability Can Be Apportioned*

In *Burlington Northern & Santa Fe Railway Co. v. United States*,<sup>145</sup> the Supreme Court limited the reach of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in two ways. First, the Court approved the “useful products” defense, refusing to assign “arranger” liability to sellers of hazardous chemicals.<sup>146</sup> Second, the Court found that factors such as geography and duration could be used, rather than joint and several liability, to apportion an indivisible harm such as a plume of contaminated groundwater.<sup>147</sup>

The case involved two cost recovery actions addressing the same site. The EPA and the California Department of Toxic Substances Control (DTSC) brought the first action against the Burlington Northern & Santa Fe and Union Pacific railroad companies.<sup>148</sup> The EPA and DTSC brought the second action against Shell Oil Company alleging that supply of chemical products and the provision of safeguards against the release of those products created liability as an “arranger” for the disposal of these products and therefore Shell was a responsible party with respect to the subsequent contamination.<sup>149</sup>

The District Court for the Eastern District of California held for the government but refused to hold the defendants jointly and severally liable as requested by the government. Instead, the court allocated reduced portions of the site costs among the parties.<sup>150</sup> The Court of Appeals for the Ninth Circuit affirmed Shell’s liability as an “arranger,” but reasserted the application of joint and several liability to this claim.<sup>151</sup>

The Supreme Court first considered whether Shell could be held liable as an arranger. Under section 107(a)(3) of CERCLA, liability is imposed on arrangers for the disposal of hazardous substances.<sup>152</sup> In this case, Shell sold new chemicals to an agricultural chemical distribution business, which ultimately went out of business. The Government argued to impose arranger liability on Shell as a seller of a useful, new product because Shell knew that some “disposal,” spilling and leaking would occur during at the facility and Shell had provided directions on avoiding releases.<sup>153</sup> The Supreme Court rejected the argument, holding “an entity may qualify as an arranger under § 9607(a)(3), when it takes intentional steps to dispose of a hazardous substance.”<sup>154</sup> Simply having knowledge that spills and leaks would occur, or providing instructions for reducing leaks and spills was not sufficient to transform a sale into arranging for disposal of those

---

145. 129 S. Ct. 1870 (2009).

146. *Id.* at 1878-80.

147. *Id.* at 1880-84.

148. *Id.* at 1876.

149. *Id.* at 1876-77.

150. *Id.*

151. *Id.* at 1877.

152. 42 U.S.C. § 9607(a)(3) (2006).

153. *Burlington N.*, 129 S. Ct. at 1879-80.

154. *Id.* at 1879.



materials. As a result, the Supreme Court held that Shell was not liable.<sup>155</sup>

With regard to the liability of the Railroads, the Court rejected joint and several liability. The Supreme Court reinstated the trial court's finding as the owner and property owner for a portion of the facility, the Railroads were only subject to a portion of the damages.<sup>156</sup> Although CERCLA imposes strict liability on owners of contaminated property under section 107(a)(1), the Court held that CERCLA did not mandate joint and several liability in every case.<sup>157</sup> The Court relied upon section 433A of the Restatement (Second) of Torts, which provides: "[W]hen two or more persons acting independently cause a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused."<sup>158</sup>

Thus, the Court affirmed the allocation, which was based on basic, known site characteristics.<sup>159</sup> The Court found that the District Court appropriately applied and reasonably considered basic and easily identifiable factors such as geography (percentage of land owned), duration of ownership, and relative cost of remediation of different hazardous substances.<sup>160</sup>

#### *B. Contribution, Who May Sue Under CERCLA, and Applying Burlington Northern*

In *Evansville Greenway & Remediation Trust v. Southern Indiana Gas & Electric Co.*,<sup>161</sup> the court addressed several motions for summary judgment filed by various parties. This case involved several contaminated sites, some of which had been remediated by the Greenway Trust, a trust formed by the former site owner and operator (GWP) who had been identified as potentially responsible party (PRP).<sup>162</sup> The trust then sued several defendants for cost recovery of site remediation costs pursuant to section 107(a)<sup>163</sup> of CERCLA and the Indiana

---

155. *Id.* at 1880. Justice Ginsburg dissented from this holding, based on the fact that Shell knew that spills occurred repeatedly and the "control rein held by Shell over the mode of delivery and transfer." *Id.* at 1885 (Ginsburg, J., dissenting).

156. *Id.* at 1883.

157. *Id.* at 1880-81 (citing *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983)).

158. *Id.* at 1881 (quoting *RESTATEMENT (SECOND) OF TORTS* §§ 453A, 881 (1976)) (alterations omitted).

159. *Id.* at 1881-83. Justice Ginsburg also dissented on the apportionment issue because the District Court's efforts, while "heroic," did not allow the parties to rebut the court's apportionment calculations. As such, Justice Ginsburg would have remanded the case in order to give the parties such an opportunity. *Id.* at 1185-86.

160. *Id.* at 1883.

161. 661 F. Supp. 2d 989 (S.D. Ind. 2009).

162. *Id.* at 992-93.

163. 42 U.S.C. § 9607(a) (2006).

Environmental Legal Actions (ELA) statute.<sup>164</sup> Some of the defendants assigned their rights to an entity called the PRP Group, which in turn sued several third party defendants.<sup>165</sup>

The PRP Group sought summary judgment on the liability of the GWP. The court reasoned that the PRP Group could seek summary judgment on the liability of the GWP under section 113(f)(1)<sup>166</sup> of CERCLA, even though the PRP Group was not seeking specific contribution allocation at this stage of the litigation.<sup>167</sup> In order for a party to pursue contribution from other PRPs, there must first be a determination of liability under section 107(a) of CERCLA. The court granted the PRP Group's summary judgment motion and held that GWP and its owner liable or potentially liable under section 107(a) because they admitted that they owned, operated, and arranged for transport and disposal, or both, of hazardous waste at the site.<sup>168</sup>

Several other defendants moved for summary judgment against the Greenway Trust on the theory that the Greenway Trust was not a valid entity and therefore lacked capacity to sue. The court denied this motion because the Greenway Trust was a valid trust under the Indiana Trust Code.<sup>169</sup> The court found that the Greenway Trust satisfied the statutory requirements for a trust because it was created through a written agreement and was statutorily permitted not to have a beneficiary because it was formed as a non-charitable trust.<sup>170</sup> The court also rejected the related argument that the Greenway Trust could not sue the other parties under section 107 because the GWP, which assigned its rights to the trust, was not itself sued under CERCLA and the trust was a PRP by virtue of the fact that the settlors of the trust were identified as PRPs.<sup>171</sup> The court found that the trust was not required to be a "innocent landowner" in order to pursue other PRPs under section 107.<sup>172</sup> In the court's view, if a party has incurred necessary response costs under the NCP "that party is eligible to seek recoupment of those response costs via [section] 107(a) *even if it is itself a PRP.*"<sup>173</sup>

The court addressed a motion for summary judgment filed by the Greenway Trust against Southern Indiana Gas and Electric Company (SIGECO). The court granted summary judgment on whether SIGECO was a PRP, but denied summary

---

164. IND. CODE § 13-30-9-1 (2004 & 2009 Supp.).

165. *Evansville Greenway*, 661 F. Supp. 2d at 993.

166. 42 U.S.C. § 9613(f)(1) (2006).

167. *Evansville Greenway*, 661 F. Supp. 2d at 996. A PRP who voluntarily cleans up a property, rather than in response to a suit, cannot seek contribution from other PRPs under Section 113(f), but can only sue under Section 107(a). *Id.* at 995-96 (citing *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 160-61 (2004)).

168. *Id.* at 999.

169. *Id.* at 1004. For background information on the history of the Greenway Trust, see *id.* at 1000-03.

170. *Id.* at 1004-05 (citing IND. CODE §§ 30-4-2-1(b), -19 (2008)).

171. *Id.* at 1005.

172. *Id.* at 1006 (citing *United States v. Atl. Research Corp.*, 551 U.S. 128, 139-40 (2007)).

173. *Id.* at 1009 (citations omitted).



judgment in regards to imposing joint and several liability on SIGECO.<sup>174</sup> SIGECO did not dispute that it was a PRP because the facts in the case indicated that it had transported and arranged for the transport of waste to the site, which included batteries that likely contributed to the lead contamination at the site.<sup>175</sup> SIGECO argued that it should not be held jointly and severally liable for the costs because the contamination at the site was divisible, based on *Burlington Northern*.<sup>176</sup> After reviewing *Burlington Northern*,<sup>177</sup> the court “decline[d] . . . to commit to a particular interpretation of *Burlington Northern* and how it might apply in” this case.<sup>178</sup> But the court determined that it was not timely to decide whether there was sufficient evidence within the record to apportion liability based on divisibility of the harm among the PRPs, particularly in light of the fact that the “applicable law appears to be in flux.”<sup>179</sup> Instead, the court viewed this as a matter properly reserved for trial. Lastly, the court held that a jury trial was not available in this case because the PRP Group sought contribution and a declaratory judgment under CERCLA and the ELA, which were equitable claims for which there was no right to a jury trial.<sup>180</sup>

*C. Enrollment in a Voluntary Remediation Program Does Not  
Create a Presumption that Remediation Costs Comply with  
CERCLA’s National Contingency Plan*

In *City of Gary v. Shafer*,<sup>181</sup> the District Court for the Northern District of Indiana denied defendants’ motion for summary judgment in part because issues of material fact remained regarding whether the site contamination at issue occurred during the defendants’ automobile salvage and scrap yard operations at the site. This case involved contaminated land within an area targeted for redevelopment by the City of Gary.<sup>182</sup> The court agreed with the plaintiff that the moving and spreading of contaminated soil when leveling the site could constitute “disposal” under CERCLA if it exacerbated pre-existing contamination.<sup>183</sup>

The court also rejected defendants’ arguments that response costs were not recoverable due to non-conformance with the National Contingency Plan (NCP).<sup>184</sup> Enrollment in IDEM’s Voluntary Remediation Program (VRP) was not, on its face, sufficient to show plaintiff’s remediation plan complied with the

---

174. *Id.* at 1009-10.

175. *Id.* at 1009.

176. See discussion, *supra* notes 145-60 and accompanying text.

177. *Id.* at 1011-13.

178. *Id.* at 1012.

179. *Id.*

180. *Id.* at 1013-15.

181. No. 2:07-CV-56-PRC, 2009 WL 1605136 (N.D. Ind. June 2, 2009).

182. *Id.* at \*2.

183. *Id.* at \*12-13; 42 U.S.C. § 9601(29) (2006).

184. *City of Gary*, 2009 WL 1605136 at \*14-16.

NCP; IDEM had to be involved with the remediation plan in order to argue that VRP enrollment demonstrated that costs were in conformance with the NCP.<sup>185</sup> The court distinguished remediation costs from initial site investigation and monitoring costs and held that a plaintiff is not required to show that those costs were consistent with the NCP.<sup>186</sup> IDEM had not yet approved a remediation plan for the site, and the inclusion of any dollar amounts for site clean-up within the complaint were based on estimates, which the plaintiff clearly explained. The plaintiff sought declaratory judgment for defendants to pay for past and future response costs, and the lack of certainty about the cleanup plans for the site made this an appropriate remedy.<sup>187</sup>

#### *D. Additional RCRA and CERCLA Cases*

1. *Disclosure of Damages in Environmental Cases.*—In *Barlow v. General Motors Corp.*,<sup>188</sup> property owners brought an action alleging that General Motors contaminated their land with polychlorinated biphenyls (PCBs), seeking damages on a variety of theories including trespass and nuisance.<sup>189</sup> Plaintiffs did not claim that the PCBs released by General Motors had caused any of them to become ill and General Motors was already engaged in a cleanup effort involving the U.S., EPA, and IDEM.

In its opinion, the U.S. District Court for the Southern District of Indiana ruled on multiple pending motions. These motions related to the court's earlier rulings that the plaintiffs were not entitled to medical monitoring damages or damages based on the estimated costs of a more thorough cleanup than required by the U.S., EPA, and IDEM, and that General Motors was entitled to summary judgment on plaintiffs' unjust enrichment claims and that plaintiffs' claims for long term stigma damages were not yet ripe for adjudication.<sup>190</sup>

First, the court excluded the plaintiffs' late disclosed damages claims because they violated the court's order requiring such disclosures, there was no plausible excuse provided for the late disclosures and the late disclosures prejudiced both General Motors and the court. In addition, the court sanctioned the plaintiffs and their attorneys by requiring them to pay for General Motors' fees and costs incurred in its motion to exclude the late disclosures.<sup>191</sup>

Second, the court denied General Motors' motion for summary judgment on plaintiffs' claims for damages for the loss of enjoyment of their property. In doing so, the court limited plaintiffs' evidence on such claims to plaintiffs' own

---

185. *Id.* at \*14.

186. *Id.* at \*15 (citing *Cont'l Title Co. v. People's Gas Light & Coke Co.*, No. 96 C 3257, 1999 WL 753933, at \*3 (N.D. Ill. Sept. 15, 1999)).

187. *Id.* at \*15-16.

188. 595 F. Supp. 2d 929 (S.D. Ind. 2009).

189. *Id.* at 930.

190. *Id.* at 931-32; see *Allgood v. Gen. Motors Corp.*, No. 102-CV-1077-DFH-TAB, 2006 WL 2669337 (S.D. Ind. Sept. 18, 2006).

191. *Barlow*, 595 F. Supp. 2d at 935-39.



description of their experiences and own opinions as to the fair market values of their properties due to plaintiffs' failure to timely disclose any evidence regarding lost rental value of their properties, thereby precluding the introduction of any lost rental value evidence at trial.<sup>192</sup>

Third, the court granted General Motors' motion for summary judgment on plaintiffs' emotional distress damage claims, holding that plaintiffs would not be permitted to offer evidence of "emotional distress based upon fears about their own health or the health of relatives."<sup>193</sup> But the court permitted the plaintiffs to offer evidence of "discomfort or annoyance resulting from the pollution and clean-up efforts, including emotional and aesthetic dimensions of loss of enjoyment."<sup>194</sup> Fourth, the court denied General Motors' motion to exclude testimony of one of plaintiff's experts as to the background of PCBs and their health risks, allowing the testimony with the qualification that the jury know that plaintiffs have all tested negative for PCB exposure and there is no evidence of increased health risks to the plaintiffs because of General Motors' operations at the site.<sup>195</sup>

Finally, the court granted General Motors' motion for summary judgment regarding plaintiffs' claims for damages based on contamination of three groundwater wells where the plaintiffs were served by city utilities and had failed to present evidence or explanation addressing the loss of use of the wells as an element of damages.<sup>196</sup>

2. *Discovery Violations Lead to Default in Environmental Suit.*—Candor with the court, and between client and attorney in an environmental litigation were in the spotlight in *1100 West, LLC v. Red Spot Paint & Varnish Co.*<sup>197</sup> Here, District Judge McKinney issued a lengthy order granting 1100 West's motion for sanctions for discovery violations in an environmental contamination case.<sup>198</sup> In 2005, 1100 West sued Red Spot Paint & Varnish Co., Inc., alleging that contamination migrated from Red Spot's site to 1100 West's property.<sup>199</sup> 1100 West sought injunctive relief under the Resource Conservation and Recovery Act (RCRA)<sup>200</sup> and claimed that part of the contamination was caused by trichloroethylene and tetrachloroethylene used at Red Spot's facility.<sup>201</sup> The

---

192. *Id.* at 938-41.

193. *Id.* at 945.

194. *Id.*

195. *Id.*

196. *Id.* at 948.

197. No. 1:05-cv-1670-LJM-JMS, 2009 WL 1605118 (S.D. Ind. June 5, 2009).

198. *Id.* at \*36.

199. *Id.* at \*1-4. 1100 West sued Red Spot in state court with similar allegations in 2003, and that suit was subsequently consolidated with the 2005 federal claim. *Id.* at \*2-3.

200. 42 U.S.C. §§ 6901-6908a (2006).

201. *1100 West*, 2009 WL 1605118, at \*1, 3. The Indianapolis law firm Bose McKinney & Evans LLP represented Red Spot prior to the filing of the motion for sanctions. Following the filing of the motion, Bose McKinney withdrew its representation of Red Spot. Thereafter, Ice Miller LLP appeared on the defendant's behalf.

discovery violations centered around Red Spot's and its attorneys' assertions, both in documents to the court and in deposition testimony by several Red Spot employees, that the chemicals were not used at Red Spot's facility.<sup>202</sup> As a result, the court imposed "the most onerous sanction," default judgment, and found that "pursuant to 28 U.S.C. § 2201 and 42 U.S.C. § 6972(a)," Red Spot was "liable for taking all necessary action to abate and otherwise respond to the aromatic contamination plume and the TCE/PCE contamination plume on [1100 West's] property."<sup>203</sup>

3. *Clean Up Order in RCRA Litigation Is Not a Debt Discharged in Bankruptcy.*—In *United States v. Apex Oil Co.*,<sup>204</sup> the Seventh Circuit Court of Appeals decided that an injunction ordering the clean-up of contamination is not discharged by the defendant's bankruptcy.<sup>205</sup> The court examined the applicable bankruptcy code provisions that defined claims<sup>206</sup> and determined that an injunction ordering the defendant to clean up a site is not the same as a right of payment.<sup>207</sup> The EPA had sued the defendant under section 6973(a) of RCRA, and the court reasoned that an injunction ordering remediation was not a right of payment in part because that RCRA "does not authorize *any* form of monetary relief."<sup>208</sup> The court further held that discharge could not be applied to injunctions such as this simply because money would be spent in carrying out the injunction.<sup>209</sup>

Recognizing the complexities of environmental remediation, the court made it clear that injunctions outlining what a defendant was required to do to effectuate a site clean up did not need to outline every standard or method.<sup>210</sup> Federal Rule of Civil Procedure 65(d) requires specificity within the terms of an injunction,<sup>211</sup> and the defendant attempted to argue that the trial court's mandatory injunction was impermissibly vague.<sup>212</sup> The court held that "[t]o specify the details of the project in the decree would either impose impossible rigidity on the performance of the clean up or, more likely, require constant recourse to the district judge for interpretation or modification of the decree."<sup>213</sup>

---

202. *1100 West*, 2009 WL 1605118 at \*1.

203. *Id.* at \*35 (citing 28 U.S.C. § 2201 (2006); 42 U.S.C. § 6972(a) (2006)).

204. 579 F.3d 734 (7th Cir. 2009).

205. *Id.* at 735-36, 740.

206. 11 U.S.C. § 101(5)(A)-(B) (defining claim as either a right of payment or a right to an equitable remedy that gives rise to a right to payment).

207. *Apex Oil*, 579 F.3d at 735-36.

208. *Id.* at 736 (citing 42 U.S.C. § 6973(a) (2006)); *see also id.* (citing *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483-87 (1996) (interpreting a similar part of the RCRA statute, 42 U.S.C. § 6972(a)(2) (2006))).

209. *Id.* at 737.

210. *Id.* at 739-40.

211. FED. R. CIV. P. 65(d).

212. *Apex Oil*, 579 F.3d at 739. The defendant tried to argue that installing a vapor-control system that has "adequate capacities and efficiencies" was vague without specific standards. *Id.*

213. The court noted that "[a] degree of ambiguity is unavoidable in a decree ordering a



### III. DEVELOPMENTS UNDER THE CLEAN WATER ACT

During the survey period, the U.S. Supreme Court and the Seventh Circuit decided cases related to the Clean Water Act (CWA)<sup>214</sup> that touched upon whether agencies may issue fill mining waste permits,<sup>215</sup> the use of cost-benefit analysis in drafting regulations for cooling water intake structures,<sup>216</sup> challenges to CWA sewer permits,<sup>217</sup> and facts that demonstrate injury for standing purposes.<sup>218</sup>

#### A. Tension Within the Section 404 Fill Permit Process

*Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*<sup>219</sup> highlighted the regulatory tension between the EPA and the U.S. Army Corps of Engineers when issuing fill permits pursuant to section 404<sup>220</sup> of the CWA. In this case, Coeur Alaska sought to reopen a gold mine and utilize a froth flotation technique where crushed rock is churned with a chemical and water mixture to separate out the gold-bearing minerals.<sup>221</sup> In order to discharge this mining waste into a nearby lake, referred to as slurry, Coeur was required to obtain a section 404 permit from the Corps.<sup>222</sup> To complete these processes, Coeur also proposed to dam a downward stream in order to isolate the lake into which the slurry was discharged from other surface water.<sup>223</sup> Coeur proposed to then treat this lake water and discharge the purified water into a stream.<sup>224</sup> To do so, Coeur was also required to obtain a section 402<sup>225</sup> permit from the EPA.<sup>226</sup>

Under the CWA, discharge of crushed rock is not allowed,<sup>227</sup> but the CWA also “empowers” the Corps to issue a permit for the discharge of “dredged or fill

---

complicated environmental clean up.” *Id.* at 740. If the defendant wanted clarification on the order, or had a dispute with the EPA about the meaning of something within the injunction, it could then seek guidance from the district court. *Id.*

214. 33 U.S.C. §§ 1251-1387 (2006).

215. *Coeur Alaska, Inc. v. Se. Alaska Conversation Council*, 129 S. Ct. 2458 (2009).

216. *Energy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009).

217. *Friends of Milwaukee's Rivers & Alliance for Great Lakes v. Milwaukee Metro. Sewerage*, 556 F.3d 603 (7th Cir. 2009).

218. *Pollack v. U.S. Dep't of Justice*, 577 F.3d 736 (7th Cir. 2009).

219. 129 S. Ct. 2458 (2009).

220. 33 U.S.C. § 1344 (2006).

221. *Coeur Alaska*, 129 S. Ct. at 2463-64.

222. *Id.* at 2464.

223. *Id.*

224. *Id.*

225. 33 U.S.C. § 1342 (2006).

226. *Coeur Alaska*, 129 S. Ct. at 2463-65.

227. 33 U.S.C. § 1311(a) (2006). The crushed rock within the slurry is classified as a “pollutant” under the CWA. *Id.* § 1362(6); *Coeur Alaska*, 129 S. Ct. at 2464.

material.”<sup>228</sup> In this case, the Corps considered the environmental effects of the proposed discharge activity and applied EPA guidelines to determine that this was the “‘least environmentally damaging practicable’ way to dispose of the” slurry as compared to possible alternatives.<sup>229</sup> Although the environmental groups sought an EPA veto of the Corps permit, the EPA did not exercise its veto authority despite the EPA’s view that the discharge was not “‘environmentally preferable.’”<sup>230</sup> The EPA also granted Coeur’s requested section 402 permit to allow the discharge from the slurry lake into a downstream creek, but the permit required compliance with strict water quality rules.<sup>231</sup>

Several environmental groups challenged these actions, arguing that Coeur should have obtained a section 402 permit from the EPA to discharge the slurry into the lake.<sup>232</sup> The U.S. Supreme Court rejected this argument, determining that section 402 expressly exempts fill permits from EPA’s permitting authority,<sup>233</sup> and that EPA’s authority in regards to fill material was limited to writing guidelines for the Corps and the ability to veto the Corps’ issuance of a section 404 permit.<sup>234</sup> Because the slurry met the definition of fill material, and because section 404 gives the Corps the authority to issue permits for discharging fill material into waterways, the Corps, not the EPA, had the authority to issue the fill permit to Coeur Alaska.<sup>235</sup>

In addition, the petitioners argued that an EPA new source performance standard (NSPS) that prohibits discharge of process wastewater barred the discharge.<sup>236</sup> A point source is not permitted to operate in violation of a performance standard under section 306(e) of the CWA.<sup>237</sup> The Court examined the CWA, EPA’s regulations, and EPA’s interpretations of the CWA in order to determine whether section 404 permits had to comply with NSPS.<sup>238</sup> Section 402, which grants EPA permitting authority, references section 306, but section 404 does not.<sup>239</sup> The Court inferred this silence to mean that Congress did not intend the Corps to consider section 306 when issuing a permit under section 404.<sup>240</sup> The CWA and relevant regulations were ambiguous on this point, so the Court examined how the EPA itself interpreted these statutes. An EPA memorandum

---

228. 33 U.S.C. § 1344(a) (2006); *Coeur Alaska*, 129 S. Ct. at 2464.

229. *Coeur Alaska*, 129 S. Ct. at 2465.

230. *Id.*

231. *Id.* at 2465-66.

232. *Id.* at 2463.

233. *Id.* at 2467 (citing 33 U.S.C. § 1342(a)(1) (2006)).

234. *Id.* (citing 33 U.S.C. §§ 1344(b)-(c) (2006)).

235. *Id.* at 2468-69. Fill material is defined as “material [that] has the effect of . . . [c]hanging the bottom elevation” of a water body. 40 C.F.R. § 232.2 (2009).

236. *Coeur Alaska*, 129 S. Ct. at 2466. The EPA published the NSPS relating to froth flotation at 40 C.F.R. § 440.104(b)(1) (2009).

237. 33 U.S.C. § 1316(e) (2006).

238. *Coeur Alaska*, 129 S. Ct. at 2467-68.

239. 33 U.S.C. § 1342(k) (2006); *Coeur Alaska*, 129 S. Ct. at 2471.

240. *Coeur Alaska*, 129 S. Ct. at 2471.



evaluating a similar project said that effluent guidelines do not apply to the placement of slurry into a closed body of water.<sup>241</sup> The Court viewed this as a “reasonable” interpretation of the CWA regulatory scheme that was “not ‘plainly erroneous or inconsistent with the regulation[s].’”<sup>242</sup> The Court outlined five factors that supported its conclusion that the EPA memorandum complied with the CWA’s framework. Those factors were: 1) the “[m]emorandum preserve[d] a role for the EPA’s performance standard” by limiting its application to situations involving closed bodies of water; 2) the EPA’s interpretation “guard[ed] against the possibility of evasion of those standards” by applying to situations in which the applicant is disposing of slurry that falls squarely within the definition of fill material; 3) this interpretation “employ[ed] the Corps’ expertise in evaluating the effects of fill material on the aquatic environment;” 4) toxic pollutants are not allowed to be discharged; and 5) “we have been offered no better way to harmonize the regulations.”<sup>243</sup>

Writing for a three-member dissent, Justice Ginsburg characterized the majority’s interpretation as creating an “escape hatch” and “loophole.”<sup>244</sup> In her view, joined by Justices Stevens and Souter, the majority’s opinion allowed industry to discharge waste into bodies of water by being able to call it fill material because it raised the bottom of a body of water.<sup>245</sup> This seemed contrary to the CWA’s “goal of eliminating water pollution, and Congress’ particular rejection of the use of navigable waters as waste disposal sites.”<sup>246</sup>

### *B. Use of a Cost-Benefit Analysis when the CWA Is Silent*

May the EPA consider cost in a regulation that is supposed to “reflect the best technology available for minimizing adverse environmental impact”?<sup>247</sup> The U.S. Supreme Court answered in the affirmative in *Entergy Corp. v. Riverkeeper, Inc.*<sup>248</sup> Environmental groups and several states challenged regulations for existing cooling water intake structures that the EPA promulgated under section 316(b) of the CWA.<sup>249</sup> Power plants use these intake structures to cool the facilities by taking water from nearby water sources.<sup>250</sup> The regulations at issue set national performance standards (NPS) for existing power plants that called for a large reduction in harm to aquatic wildlife typically harmed by the water intake process.<sup>251</sup> The EPA crafted these regulations based on “commercially available

---

241. *Id.* at 2474-76.

242. *Id.* at 2473 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

243. *Id.* at 2473-74.

244. *Id.* at 2483 (Ginsburg, J., dissenting).

245. *Id.*

246. *Id.*

247. 33 U.S.C. § 1326(b) (2006).

248. 129 S. Ct. 1498 (2009).

249. 33 U.S.C. § 1326(b) (2006); *Entergy Corp.*, 129 S. Ct. at 1502.

250. *Entergy Corp.*, 129 S. Ct. at 1502.

251. *Id.* at 1504 (citing 40 C.F.R. § 125.94(b)(1) (2009) (requiring an eighty to ninety-five

and economically practicable” technologies.<sup>252</sup> The EPA refused to require a closed-cycle system for existing facilities based on the large costs associated with retrofitting existing facilities with this new technology, particularly in light of the small difference in the reduction in harm.<sup>253</sup>

These regulations also allowed for site-specific variances if a facility could demonstrate that “costs of compliance are ‘significantly greater than’ the costs considered by the agency in setting the standards”<sup>254</sup> or that compliance costs “‘would be significantly greater than the benefits of complying with the applicable performance standards.’”<sup>255</sup> If a variance were granted, remedial measures would be imposed in order to reach results “‘as close as practicable to the applicable performance standards.’”<sup>256</sup>

After examining the standard set forth in section 316(b), “the best technology available for minimizing adverse environmental impact”<sup>257</sup> (BTA), the Court determined that the EPA’s interpretation was reasonable because the standard “does not unambiguously preclude cost-benefit analysis.”<sup>258</sup> The Court characterized the “minimizing” portion of the standard as “less ambitious” than those that used the term eliminate, indicating that the EPA still held some discretion in setting the NPS.<sup>259</sup>

The petitioners argued that the structure of the CWA, and the various technology standards within it, precluded consideration of costs unless it was explicitly part of the standard.<sup>260</sup> The Court examined four of the tests within the CWA: “‘best practicable control technology currently available’” (BPT),<sup>261</sup> “‘best conventional-pollutant control technology’” (BCT),<sup>262</sup> “‘best available technology economically achievable’” (BATEA),<sup>263</sup> and “‘best available demonstrated control technology’” (BADT).<sup>264</sup> The factors for each of these tests instructed whether the EPA could consider costs when formulating a standard.<sup>265</sup> The petitioners argued that because the BADT and BATEA tests did not allow cost-benefit analysis, and BTA was similarly silent on the issue, that the EPA was

---

percent reduction in impingement, where organisms are trapped against the screens, and sixty to ninety percent reduction in entrainment, where organisms are sucked up into the cooling structures)).

252. *Id.* at 1504 (quoting 69 Fed. Reg. 41576, 41602 (2004)).

253. *Id.* (citing 69 Fed. Reg. at 41601, 41605 (2001)).

254. *Id.* (citing 40 C.F.R. § 125.94(a)(5)(i) (2009)).

255. *Id.* at 1504-05 (citing 40 C.F.R. § 125.94(a)(5)(ii) (2009)).

256. *Id.* at 1505 (citing 40 C.F.R. § 125.94(a)(5)(i), (ii) (2009)).

257. 33 U.S.C. § 1326(b) (2006).

258. *Entergy Corp.*, 129 S. Ct. at 1506.

259. *Id.*

260. *Id.* at 1506-08.

261. *Id.* at 1507 (citing 33 U.S.C. § 1311(b)(1)(A) (2006)).

262. *Id.* (citing 33 U.S.C. § 1311(b)(2)(E) (2006)).

263. *Id.* (citing 33 U.S.C. § 1311(b)(2)(A) (2006)).

264. *Id.* (citing 33 U.S.C. § 1316(a)(1) (2006)).

265. *Id.*



not permitted to engage in cost-benefit analysis in promulgating standards under the BTA.<sup>266</sup>

This reasoning did not persuade the Court because all four of the tests allowed cost considerations.<sup>267</sup> Additionally, the Court noted that BTA differed from the other four tests in that it did not explicitly include factors that the EPA was instructed to consider when applying it.<sup>268</sup> Extending the reasoning offered by the petitioners would mean that “the EPA could not consider *any* factors” at all when applying BTA.<sup>269</sup> The Court asserted that the lack of factors in the BTA was “nothing more than a refusal to tie the agency’s hands as to whether cost-benefit analysis should be used, and if so to what degree.”<sup>270</sup> The Court conceded that, “sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion,” but the Court believed statutory silence could not be interpreted in this manner as it related to section 316(b).<sup>271</sup> The Court recognized that the NPS for cooling intake towers would require large expenditures with “meager financial benefits” to the operators, indicating that the EPA was not attempting to craft standards where benefits equaled costs, but rather to “avoid extreme disparities between costs and benefits.”<sup>272</sup> In previous decisions interpreting section 316(b), the EPA determined that this part of the statute did not “requir[e] use of technology whose cost is wholly disproportionate to the environmental benefit to be gained.”<sup>273</sup>

Reversing the Second Circuit, the Court “conclude[d] that the EPA permissibly relied on cost-benefit analysis” when drafting the NPS and establishing a cost-benefit variance.<sup>274</sup> Justice Stevens, joined by Justices Souter and Ginsburg, dissented, arguing that the legislative history and text of the CWA indicate “that Congress granted the EPA authority to use cost-benefit analysis in some contexts but not others, and that Congress intend to control, not delegate, when cost-benefit analysis should be used.”<sup>275</sup>

---

266. *Id.* at 1506-08.

267. *Id.* at 1508.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* (citing *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 467-68 (2001)).

272. *Id.* at 1509.

273. *Id.* (quoting *In re Pub. Serv. Co. of N.H.*, 1 E.A.D. 332, 340 (1977)). In a concurring and dissenting opinion, Justice Breyer noted that the “wholly disproportionate” standard was different from the “significantly greater” standard outlined in the regulations’ variance provisions. *Id.* at 1515 (Breyer, J., concurring in part, dissenting in part). Justice Breyer would have permitted the lower court to remand the case to the EPA to either apply the “wholly disproportionate” standard or explain why it was employing a different standard. *Id.* at 1516.

274. *Id.* at 1510.

275. *Id.* at 1518 (Stevens, J., dissenting) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

*C. Difficulties in Challenging Post-Stipulation Violations of a CWA Permit*

Municipal separate storm sewer systems are an enforcement priority for the EPA in Fiscal Years 2008 to 2010,<sup>276</sup> and they are a candidate for being an enforcement priority in Fiscal Year 2011 to 2013.<sup>277</sup> Heavy rainfalls can cause overflows in storm sewer systems that in turn lead to the release of sanitary sewage into waterways.<sup>278</sup> As seen below, municipalities that work to update their infrastructure to address CWA compliance may encounter hurdles, such as the evidentiary issues encountered by the City of Milwaukee.

In *Friends of Milwaukee's Rivers & Alliance for Great Lakes v. Milwaukee Metropolitan Sewerage District*,<sup>279</sup> the Seventh Circuit heard an appeal of a citizen suit against the Milwaukee Metropolitan Sewerage District (MMSD) for overflows that occurred after the district settled with Wisconsin.<sup>280</sup> The appeal centered around whether the trial court had afforded sufficient weight to evidence presented by the plaintiffs that a 2002 Stipulation entered into between the state and MMSD did not address sanitary sewer overflows (SSOs) that resulted in violations of the CWA.<sup>281</sup> In an earlier case, the Seventh Circuit reviewed whether the district court properly dismissed the suit against MMSD on the ground that the settlement with the state barred the suit under the doctrine of res judicata.<sup>282</sup> The court remanded the case after determining that the trial court did not adequately address one of the three elements of res judicata.<sup>283</sup> In essence, privity between the state and the petitioners was not present because there was not enough evidence in the proceedings below to support a finding that the 2002 Stipulation would bring the MMSD into compliance with the CWA, therefore satisfying the requirement that a "prosecution" is "diligent."<sup>284</sup>

On remand, the district court found there was sufficient evidence to show that the 2002 Stipulation was a diligent prosecution for privity purposes and dismissed the suit.<sup>285</sup> The appellate court applied the clear error standard of review to

---

276. Environmental Protection Agency, *National Enforcement Initiatives for Fiscal Years 2008-2010: Clean Water Act: Storm Water*, available at <http://www.epa.gov/compliance/data/planning/priorities/cwastorm.html>.

277. Environmental Protection Agency, *Background Paper for Candidate National Enforcement Priority: Wet Weather Municipal Infrastructure* (Jan. 2010), available at <http://www.epa.gov/compliance/resources/publications/data/planning/priorities/fy2011candidate/s/fy2011candidate-municipal.pdf>.

278. See, e.g., *Friends of Milwaukee's Rivers & Alliance for the Great Lakes v. Milwaukee Metro. Sewerage Dist. (FMR II)*, 556 F.3d 603, 606 (7th Cir. 2009).

279. *Id.*

280. *Id.* at 605.

281. *Id.* at 605-09.

282. *Friends of Milwaukee's Rivers & Lake Michigan Fed'n v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 757 (7th Cir. 2004).

283. *Id.* at 765.

284. *Id.* at 760, 763-65.

285. *Friends of Milwaukee's Rivers & Lake Michigan Fed'n v. Milwaukee Metro. Sewerage*



determine whether the trial court gave sufficient weight to evidence of SSOs and agency actions taken after the 2002 Stipulation.<sup>286</sup> The court noted that the long history of the case presented a unique issue as to how to handle post-stipulation evidence when evaluating whether Wisconsin's entry into the 2002 Stipulation satisfied the diligent prosecution prong.<sup>287</sup> Although post-stipulation evidence presented practical difficulties, the court determined that it was still relevant to evaluating *res judicata*.<sup>288</sup>

The court rejected the petitioners' argument that the trial court failed to give sufficient weight to post-stipulation SSOs.<sup>289</sup> The scope of the 2002 Stipulation required improvements that would take some time to implement, and therefore overflows that occurred in the years after the stipulation did not indicate that the MMSD would not become compliant with the CWA once all components of the 2002 Stipulation were in place.<sup>290</sup> The petitioners also bore the burden of laying a proper foundation for post-stipulation SSO evidence, and the petitioners had to show that the court should afford the evidence significant weight.<sup>291</sup> In order to demonstrate this significant weight, the petitioners had to demonstrate:

that the SSO (1) resulted from the same underlying causes as were addressed by the 2002 Stipulation; (2) was a violation of the applicable permit; (3) would not have been prevented by the stipulation's projects, if those projects had been completed; and (4) that the proffered evidence satisfies all other generally applicable evidentiary requirements.<sup>292</sup>

In addition, the fact that the state had pursued a new enforcement action against MMSD for CWA violations was not sufficient to show that the earlier Stipulation was not diligent.<sup>293</sup>

#### *D. The Challenge of Showing Injury in Fact in CWA Citizen Suits*

In *Pollack v. U.S. Department of Justice*,<sup>294</sup> the Seventh Circuit evaluated whether an environmental group and its executive director had standing to sue the government for allegedly violating several environmental laws, including the CWA.<sup>295</sup> The federal government owned a gun range where lead bullets had been

---

Dist., No. 02-C-0270, 2007 WL 4410402, at \*11 (E.D. Wis. Dec. 14, 2007).

286. *FMR II*, 556 F.3d at 609-10 (citing *Trs. of Chi. Painters & Decorators Funds v. Royal Int'l Drywall & Decorating, Inc.*, 493 F.3d 782, 785 (7th Cir. 2007)).

287. *Id.* at 610.

288. *Id.* at 610-11.

289. *Id.* at 612-13.

290. *Id.*

291. *Id.* at 613.

292. *Id.*

293. *Id.* at 614-15. The 2005 enforcement action resulted in a new 2008 Stipulation. *Id.* at 614.

294. 577 F.3d 736 (7th Cir. 2009).

295. *Id.* at 737.

discharged into Lake Michigan over several decades, and the plaintiffs claimed the deterioration of the lead bullets in the lake injured the environment.<sup>296</sup> The court evaluated whether the plaintiffs showed they were at risk of suffering a concrete injury, the “injury in fact” requirement for standing.<sup>297</sup>

The environmental group based its standing on injuries supposedly suffered by two of its members, none of which the court found sufficient to establish standing.<sup>298</sup> Fear of contaminated drinking water can be enough to establish an injury so long as the alleged contamination would actually affect the plaintiff’s drinking water.<sup>299</sup> The plaintiff members both lived in an area that obtained its drinking water from a different part of Lake Michigan; so, it was unlikely the water affected them.<sup>300</sup> The court rejected the plaintiffs’ reliance on *Sierra Club v. Franklin County Power of Illinois, LLC*,<sup>301</sup> a case involving a petitioner who challenged a proposed power plant on the basis that air pollution would impact her enjoyment of a nearby lake.<sup>302</sup> As opposed to air pollution that can travel several miles, this case is distinguishable because the plaintiffs were not able to demonstrate that the lead bullets were contaminating the area of the lake thirteen miles away from which they drew their water.<sup>303</sup> In addition, the alleged contamination’s impact on the plaintiffs’ desire to eat ocean and freshwater fish was not enough to establish an injury because the plaintiffs failed to make it clear that the fish they wanted to eat actually came from the affected area of Lake Michigan.<sup>304</sup> The plaintiffs’ claims of the contamination impacting bird watching in the Great Lakes watershed and visiting parks along Lake Michigan were also rejected because they did not provide a nexus between the area harmed by the lead bullets and these areas.<sup>305</sup> Writing in concurrence, Circuit Judge Cudahy noted that this was a “close case”<sup>306</sup> and “that the farther the plaintiff is from the ‘area of injury,’ the more evidence he generally must put forth to prove that he

---

296. *Id.* at 737-38.

297. *Id.* at 739.

298. *Id.* at 738. As noted in the concurring opinion, “the broad nature of the citizen-suit provisions means that in many cases, like this one, the real test will be proof of standing, not of the merits.” *Id.* at 743-44 (Cudahy, J., concurring).

299. *Id.* at 741 (majority opinion).

300. *Id.* The court differentiated the instant case from *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000), in which a plaintiffs were able to show standing in a case involving a polluted river, in part because they were located downstream from the contamination. *Pollack*, 577 F.3d at 741.

301. 546 F.3d 918 (7th Cir. 2008).

302. *Id.* at 925.

303. *Pollack*, 577 F.3d at 740-41.

304. *Id.* at 742. Their “desire to eat ocean fish is not implicated because Lake Michigan is not the ocean.” *Id.*

305. *Id.* at 742-43 (citing *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149-50 (2009); *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 886, 889 (1990)).

306. *Id.* at 743 (Cudahy, J., concurring).



is ‘among the injured.’”<sup>307</sup>

#### IV. ENVIRONMENTAL CASES UNDER STATE LAW

Indiana courts issued several prominent environmental opinions during the survey period. As previewed in last year’s Article,<sup>308</sup> the Indiana Supreme Court announced new authority on the statute of limitations governing Indiana’s Environmental Legal Action statute.<sup>309</sup> Although the opinion clearly permitted South Bend’s claim to proceed,<sup>310</sup> questions persist regarding application of the newly announced standard. In other litigation, the Indiana Supreme Court refused to find IDEM breached its obligation when it encouraged EPA to pursue a site for which IDEM had previously entered into an agreed order.<sup>311</sup> Two state court opinions addressed nuisance claims between neighbors,<sup>312</sup> while two additional decisions regarding standing<sup>313</sup> round out this Part’s discussion.

##### *A. Statute of Limitations in Indiana’s Environmental Legal Action Statute*

In last year’s survey Article, we previewed *Cooper Industries, LLC v. City of South Bend*<sup>314</sup> in which the Indiana Supreme Court addressed the statute of limitations period for common law trespass and nuisance claims arising from environmental contamination and the ELA statute.<sup>315</sup> The ELA allows a person to

bring an environmental legal action against a person that caused or contributed to the release . . . of a hazardous substance or petroleum into the surface or subsurface soil or groundwater that poses a risk to human health and the environment . . . to recover reasonable costs of a removal or remedial action involving the hazardous substances or petroleum.<sup>316</sup>

The ELA contains no specific statute of limitations provision.

The City of South Bend and the South Bend Redevelopment Commission (collectively “South Bend”) sued Cooper Industries, the corporate successor of the Studebaker Corporation.<sup>317</sup> Studebaker manufactured automobiles and other

---

307. *Id.* at 746.

308. Freedom S.N. Smith et al., *2007-2008 Environmental Law Survey: A System in Flux*, 42 IND. L. REV. 973, 988 (2009).

309. *Cooper Indus., LLC v. City of South Bend*, 899 N.E.2d 1274 (Ind. 2009).

310. *Id.* at 1286.

311. *Ind. Dep’t of Env’tl. Mgmt. v. Raybestos Prods. Co.*, 897 N.E.2d 469, 477 (Ind. 2009).

312. *Borewitz v. Parker*, 912 N.E.2d 378 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 558 (Ind. 2009); *Lindsey v. DeGroot*, 898 N.E.2d 1251 (Ind. Ct. App.), *aff’d*, 898 N.E.2d 1251 (Ind. 2009).

313. *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009); *Save the Valley, Inc. v. Ferguson*, 896 N.E.2d 1205 (Ind. Ct. App. 2008).

314. 899 N.E.2d 1274 (Ind. 2009).

315. Smith et al., *supra* note 308, at 988.

316. IND. CODE § 13-30-9-2 (2009 Supp.).

317. *Cooper Indus.*, 899 N.E.2d at 1277-78.

products from the 1850s until 1963 in facilities covering over 100 acres in the South Bend.<sup>318</sup> South Bend sought recovery for contamination to land it acquired for redevelopment from 1986-1997.<sup>319</sup> South Bend sued in 2003, pursuant to Indiana tort theories and under the ELA.<sup>320</sup> The defendant argued that the statute of limitations barred South Bend's claims because South Bend had comprehensive knowledge of the contamination at issue as early as 1988.<sup>321</sup> Although the legislature only created the ELA in 1998, the defendants argued the statute of limitations began running upon discovery, even if South Bend's knowledge accrued before the passage of the ELA.<sup>322</sup> The court of appeals agreed, holding that the statute of limitations barred South Bend's claims under the ELA and its common law tort theories (negligence, trespass, and public and private nuisance).<sup>323</sup>

The Indiana Supreme Court reversed, the decision of court of appeals, in part, holding that South Bend's tort claims for property damage under Indiana Code section 34-11-2-7 were barred by the statute of limitations because they accrued more than six years before a claim was filed.<sup>324</sup> The court rejected South Bend's argument that the cause of action could not accrue until it owned the contaminated property because "Indiana adheres to the rule that 'third parties are usually held accountable for the time running against their predecessors in interest.'"<sup>325</sup> Between 1986 and 1997, South Bend requested and received several environmental reports that showed contamination at the subject site, and in 1995 even summarized those reports in an internal memorandum.<sup>326</sup> This was sufficient to show that South Bend knew about the contamination more than six years before suing.<sup>327</sup>

Claims, however, brought under the ELA were timely, as South Bend did not have a complete cause of action until the ELA became effective in 1998, and therefore the statute of limitation did not begin to accrue until that time.<sup>328</sup> The court reviewed the ELA's legislative history and determined that, because the

---

318. *Id.*

319. *Id.* at 1277-78, 1280.

320. *Id.* at 1278.

321. *Id.* at 1278-79.

322. *Id.*

323. *Id.* at 1279 (citing *Cooper Indus., LLC v. City of South Bend*, 863 N.E.2d 1253, 1261 (Ind. Ct. App. 2007)).

324. *Id.* at 1279-80. The court distinguished this case from *Pflanz v. Foster*, in which a ten-year statute of limitations applied because it involved a contribution action and not a property damage claim. *Id.* at 1279 (citing *Pflanz v. Foster*, 888 N.E.2d 756 (Ind. 2008)). The cause of action in *Pflanz v. Foster* began to run after the claimant was ordered to clean up the property, which gave rise to the contribution claim. *Pflanz*, 888 N.E.2d at 759-60.

325. *Cooper Indus.*, 899 N.E.2d at 1279 (quoting *Mack v. Am. Fletcher Nat'l Bank & Trust Co.*, 510 N.E.2d 725, 734 (Ind. Ct. App. 1987)).

326. *Id.* at 1280.

327. *Id.*

328. *Id.* at 1280, 1284-86.



legislature drafted the statute to prohibit a person from seeking claims under both the ELA and Indiana's Underground Storage Tank Act,<sup>329</sup> "the General Assembly clearly intended to create a new and separate cause of action."<sup>330</sup> In addition, a statute of limitation could not begin to run before the cause of action even existed.<sup>331</sup>

The court did not clearly choose a limitations period to apply to claims brought under the ELA.<sup>332</sup> Because South Bend filed suit within five years of passage of the statute, the suit was timely under even the shortest applicable period, the six-year statute of limitations for property damage.<sup>333</sup> Although the court explained South Bend's case was permitted under this period, it did not expressly address whether the six-year or ten-year "catch-all" statute of limitation<sup>334</sup> applies to ELA claims.<sup>335</sup> The defendant raised concerns about claims relating to "ancient contamination" being brought long after facts were known.<sup>336</sup> But the court concluded that the discovery rule would apply to the ELA as it would to the USTA: "the statute of limitation will begin to run on the earlier date of actual discovery or when a reasonable person would discover the facts."<sup>337</sup> The court's opinion provides assurance for plaintiffs who filed suit under the ELA before 2004 (or 2008 assuming the ten year statute applies). But it does not answer how to apply the discovery rule to environmental contamination claims.

The court also rejected defendants' assertions that South Bend could not bring an ELA claim.<sup>338</sup> Even though the ELA was unclear whether a "private person,"<sup>339</sup> includes municipalities, the court allowed South Bend's claim.<sup>340</sup> Because the legislature sought to "shift the financial burden of environmental remediation to the parties responsible for creating contaminations," the court rejected the defendants' narrow interpretation of "private person" which excluded cities, in part because cities were expressly defined within the definition of "person."<sup>341</sup>

---

329. IND. CODE § 13-23-13-8 (2004).

330. *Cooper Indus.*, 899 N.E.2d at 1282-83 (citing IND. CODE § 13-30-9-6 (2000)).

331. *Id.* at 1285 (quoting *Martin v. Richey*, 711 N.E.2d 1273, 1284 n.12 (Ind. 1999)).

332. *Id.* at 1286.

333. *See* IND. CODE § 34-11-2-7(3) (2008).

334. *See id.* § 34-11-1-2(a).

335. *Cooper Indus.*, 899 N.E.2d at 1286.

336. *Id.*

337. *Id.*

338. *Id.* at 1284.

339. IND. CODE § 13-30-9-1 (2004). P.L. 221-2007, § 22 deleted the word "private" from the statute. IND. CODE § 13-30-9-1 (2009 Supp.).

340. *Cooper Indus.*, 899 N.E.2d at 1284.

341. *Id.* The court also held that the defendant was the corporate successor of Studebaker for the environmental contamination claims. *See id.* at 1286-91.

*B. IDEM's Communications with EPA Do Not Breach an Agreed Order*

Do the terms of an agreed order bar IDEM from communicating with the EPA about requiring higher clean up standards for a site? In *Indiana Department of Environmental Management v. Raybestos Products Co.*,<sup>342</sup> the Indiana Supreme Court determined IDEM was not in breach of contract after it communicated with the EPA regarding a site clean up.<sup>343</sup> In this litigation, IDEM and Raybestos Products Co. (Raybestos) entered into an Agreed Order for the remediation of a ditch contaminated with polychlorinated biphenyls (PCBs).<sup>344</sup> The Agreed Order did not specify a numerical clean up level, and IDEM and Raybestos disputed the proper level and method to use for PCB removal.<sup>345</sup> After IDEM unsuccessfully attempted to remove its approval of the site, it “urged EPA to require” a stricter clean up, which resulted in EPA issuing a Unilateral Agreed Order to Raybestos requiring it to more thoroughly clean up the site.<sup>346</sup>

Raybestos brought a breach of contract claim against IDEM, arguing that the Agreed Order represented a contract between IDEM and Raybestos that IDEM breached by attempting to withdraw approval of the Risk Assessment and by requesting that EPA pursue a more stringent cleanup standard at the site.<sup>347</sup> Raybestos sought declaratory judgment and money damages for the difference between EPA’s clean up standards and IDEM’s Agreed Order.<sup>348</sup> Because of IDEM’s communications with EPA, which the court found to trigger EPA’s enforcement action against Raybestos, the trial court entered judgment in favor of Raybestos.<sup>349</sup> The court of appeals reversed because the Agreed Order outlined cleanup levels much less stringent than those allowed by federal regulations, making them unenforceable as contrary to public policy if the Agreed Order was indeed a contract.<sup>350</sup>

After granting transfer, the Indiana Supreme Court held that the Agreed Order was not a contract that supported a damages claim.<sup>351</sup> Further, the court held IDEM’s communications with EPA did not violate the agreement.<sup>352</sup> The court

---

342. 897 N.E.2d 469 (Ind. 2008), *reh’g granted in part, reh’g denied in part, corrected by* 903 N.E.2d 471 (Ind. 2009).

343. *Id.* at 477.

344. *Id.* at 471-72.

345. *Id.*

346. *Id.* at 472. Discussions with IDEM had resulted in Raybestos agreeing to remediate “hot spots” of contamination only to a level of 238 parts per million (“ppm”) PCBs, whereas the EPA’s order required Raybestos to clean up the entire ditch to a level of no greater than 10 ppm. *Id.*

347. *Id.*

348. *Id.*

349. *Id.* at 473.

350. *Id.* (citing *Ind. Dep’t of Env’tl. Mgmt. v. Raybestos Prods. Co.*, 876 N.E.2d 759, 763 (Ind. Ct. App. 2007)).

351. *Id.*

352. *Id.*



determined that Indiana Administrative Orders and Procedures Act (AOPA)<sup>353</sup> governed review of the agency's actions and money damages are not available under AOPA.<sup>354</sup> The Indiana Supreme Court also determined that the federal PCB Spill Cleanup Policy<sup>355</sup> gave EPA the flexibility to deviate from federal standards because of site-specific considerations, and that IDEM had this same flexibility.<sup>356</sup> Although the court recognized that this EPA action was likely the result of IDEM's "prodding," the Agreed Order did not "forbid IDEM's communication with EPA, and IDEM could not bind itself to fail to carry out its statutory obligations, including compliance with the federal regulations requiring communication between the agencies."<sup>357</sup> Although the Agreed Order bound IDEM to suspend its own enforcement efforts, it did not preclude all communications with the EPA about the site, or prohibit enforcement actions by other agencies under other environmental laws.<sup>358</sup>

*C. Indiana Court of Appeals Allows and Rejects Nuisance Claims  
Against Neighbors*

In *Bonewitz v. Parker*,<sup>359</sup> the plaintiffs appealed from the trial court's judgment on their complaint alleging that the defendant was maintaining a nuisance by operating a furnace to dry mycelium next to their home.<sup>360</sup> In 1997, plaintiffs bought an old farmhouse in North Manchester, which the defendant's farmland surrounded.<sup>361</sup> At the time of the plaintiffs' purchase, the adjacent farmland produced hay.<sup>362</sup> But in 2003, the defendant began using the property to dry mycelium to sell as animal feed.<sup>363</sup> The defendant dried the mycelium in a furnace that used sawdust as fuel, which emitted gases and sawdust ash through a smokestack located approximately 100 to 150 feet from the plaintiffs' home.<sup>364</sup> Before the defendant could operate his business, he had to "[obtain] a variance from agricultural use to business/commercial use," which was granted over the plaintiffs' objections.<sup>365</sup>

When the mycelium-drying business was fully operational, semi-trucks

---

353. IND. CODE §§ 4-21.5-1-1 to -7-9 (2005 & 2009 Supp.).

354. *Raybestos Prods.*, 897 N.E.2d at 474-75.

355. 40 C.F.R. §§ 761.120-761.135 (2009).

356. *Raybestos Prods.*, 897 N.E.2d at 476 (citing 40 C.F.R. § 761.120(c) (2009)).

357. *Id.* at 477 (citing 40 C.F.R. §§ 300.505, 300.515 (2009)).

358. *Id.*

359. *Bonewitz v. Parker*, 912 N.E.2d 378 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 558 (Ind. 2009).

360. *Id.* at 380. "Mycelium is a byproduct of the manufacture of food-grade citric acid." *Id.* at 379.

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.* at 379-80.

delivered wet mycelium several times each day, the furnace dried the mycelium, trucks delivered sawdust and picked up dried mycelium, with the whole process running "24/7."<sup>366</sup> The business affected the plaintiffs' enjoyment of their property due to: the smell of the mycelium, both when it was stored outside wet and during the drying process; the intrusion of sawdust on their property; vibrations from the drying process; and truck traffic at all hours of the day.<sup>367</sup> The defendant took "steps to reduce the sawdust and stack emissions blowing onto the [plaintiffs'] property," decrease the dryer's vibrations, and curtail "the noise and lights associated with the trucks during the night."<sup>368</sup>

Several years after the mycelium drying business began, the plaintiffs brought a nuisance claim against the defendant requesting a permanent injunction, or, in the alternative, damages.<sup>369</sup> The trial court found the defendants' "improvements" had "greatly reduced" the adverse effect the business on the plaintiffs' home, and the court declined to enter a total permanent injunction against the business, though it did enjoin the defendant from unloading the sawdust outside.<sup>370</sup> The court of appeals reversed, "conclud[ing] that notwithstanding the improvements, [the defendant] continue[d] to maintain an unabated nuisance which deprive[d the plaintiffs] of the free use and comfortable enjoyment of their property."<sup>371</sup>

The evidence presented by the plaintiffs included the pervasiveness of the smells throughout their home, and the effect of the defendant's business on the plaintiffs' ability "to use their yard or even to open [their] windows."<sup>372</sup> The court of appeals concluded that the plaintiffs "suffered a number of unreasonable infringements on the use and enjoyment of their property as a result of [the defendant's] business."<sup>373</sup> The court also concluded that "[w]hile the nuisance may have been partially ameliorated, it has not been abated."<sup>374</sup> The defendant argued that the plaintiffs "came to the nuisance" and that his business was similar to other agricultural uses in the area.<sup>375</sup> The court rejected this contention because the business was independent of an agricultural operation, which was why he was required to get a use variance.<sup>376</sup> Although mycelium drying for use on one's own farm does not require a variance, the scale of the defendant's business was much greater, and compared to a smaller personal production, emitted more smells and noises.<sup>377</sup>

Despite this finding, the court of appeals did not enter a permanent

---

366. *Id.* at 380.

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.* at 381.

371. *Id.* at 379.

372. *Id.* at 382.

373. *Id.*

374. *Id.*

375. *Id.* at 382-83.

376. *Id.*

377. *Id.* at 384.



injunction. The court shared the lower court's concern that entry of a permanent injunction "would effectively destroy [the defendant's] business."<sup>378</sup> The court of appeals remanded with instructions to consider whether the plaintiffs could "be made whole with a money judgment."<sup>379</sup> The court noted that the "proper measure of damages" would be "the difference between the market value of the [plaintiffs'] home if the . . . mycelium-drying operation ceased and its current market value with an active nuisance next door."<sup>380</sup> The plaintiffs "may also be entitled to damages for their discomfort and annoyance" during their time as occupants and for "consequential damages, such as moving expenses" if the plaintiffs chose to move "without suffering any financial loss."<sup>381</sup> The court of appeals instructed that if damages would not make the plaintiffs whole, the trial court had to issue a permanent injunction against the defendant's entire business.<sup>382</sup>

In *Lindsey v. DeGroot*,<sup>383</sup> the Indiana Court of Appeals clarified when a nuisance claim can be filed against agricultural operations classified as a Confined Feeding Operation (CFO), which IDEM's regulates.<sup>384</sup> In 1998, the Lindseys built a home in a rural, agricultural area.<sup>385</sup> In 2001, the DeGroots bought a hog farm and converted it into a dairy a year later with about 1500 milking cows.<sup>386</sup> After a boundary dispute, the Lindseys sued DeGroot in 2003 to enjoin the dairy's operations and for damages for nuisance, among other tort claims.<sup>387</sup> The trial court entered summary judgment in favor of the DeGroot Dairy, in part because the Indiana Right to Farm Act (IRFA)<sup>388</sup> barred the nuisance claim.<sup>389</sup> IRFA was adopted in order "to limit the circumstances under which agricultural operations could become subject to nuisance suits."<sup>390</sup>

The court analyzed whether IRFA barred the suit.<sup>391</sup> The legislature adopted the IRFA protects farms that have been in operation for more than one year from nuisance claims "unless there has been a significant change in the type of

---

378. *Id.* (quoting Appendix of Appellants at 5-6, *Bonewitz*, 912 N.E.2d 378 (Ind. Ct. App. 2009)).

379. *Id.* at 385.

380. *Id.*

381. *Id.* at 385 & n.5.

382. *Id.* at 385.

383. 898 N.E.2d 1251 (Ind. Ct. App. 2009).

384. *Id.* at 1255.

385. *Id.*

386. *Id.*

387. *Id.* at 1255-56.

388. IND. CODE § 32-30-6-9 (2008).

389. *Lindsey*, 898 N.E.2d at 1256.

390. *Id.* at 1257.

391. The state constitutional law aspect of this case involving whether the law was a taking is explored further in Jon Laramore, *Indiana Constitutional Law Developments*, 43 IND. L. REV. \_\_\_\_ (2010). The negligence per se aspects of this case are examined in Milton Turner, *Recent Developments in Indiana Tort Law*, 43 IND. L. REV. \_\_\_\_ (2010).

operation, the operation would have been a nuisance at the time the operation began in its current locality, or the nuisance results from the negligent operation of the agricultural operation.”<sup>392</sup> The Lindseys sued eighteen months after the DeGroot Dairy opened, but failed to present evidence that a significant change in the type of operation occurred or that the dairy was a nuisance when it opened.<sup>393</sup> The Lindseys’ based their nuisance claim partially on alleged violations of IDEM’s CFO regulations from a manure spill and run-off, which the Lindseys believed demonstrated the negligent operation of DeGroot Dairy.<sup>394</sup> The court held that statutory violations like this could be used to show a nuisance if those violations were the “proximate cause” of the plaintiffs’ injury or that the plaintiffs’ claimed injuries would be the “foreseeable consequence of the violation[s].”<sup>395</sup> The Lindseys claimed that the Dairy was a nuisance because its noises and smells interfered with the enjoyment of their property, but they failed to show a nexus between the problems and the violations.<sup>396</sup>

#### *D. Standing and Jurisdictional Issues*

In *Save the Valley, Inc. v. Ferguson*,<sup>397</sup> a CFO case examined in last year’s Article,<sup>398</sup> the Indiana Court of Appeals affirmed the trial court’s holding that it lacked subject matter jurisdiction to hear neighboring property owners’ claims regarding IDEM’s grant of a permit to construct a CFO where the neighboring property owners did not seek monetary damages or make common law trespass or nuisance claims.<sup>399</sup>

In *Summers v. Earth Island Institute*,<sup>400</sup> several environmental groups (including one that covers Indiana and Illinois) challenged a U.S. Forest Service (USFS) rule that exempted salvage-timber sales of 250 acres or less from certain requirements.<sup>401</sup> This exemption meant that an environmental impact statement (EIS) or environmental assessment (EA) did not have to be prepared, nor did the USFS have to provide for public notice, comment, or an appeal process.<sup>402</sup>

Specifically, the groups appealed the application of the regulations to the sale of salvage-timber from part of the Sequoia National Forest burned by a forest fire (“the Burnt Ridge project”).<sup>403</sup> The district court granted a preliminary injunction barring the timber sale, after which the parties settled the dispute specific to the

---

392. *Lindsey*, 898 N.E.2d at 1259.

393. *Id.* at 1259-60.

394. *Id.* at 1260.

395. *Id.* at 1260-62.

396. *Id.*

397. 896 N.E.2d 1205 (Ind. Ct. App. 2009).

398. Smith et al., *supra* note 308, at 997-98.

399. *Id.* at 1207.

400. 129 S. Ct. 1142 (2009).

401. *Id.* at 1147-48.

402. *Id.* at 1147.

403. *Id.* at 1147-48.



Burnt Ridge project.<sup>404</sup> The government argued that the settlement of that dispute eliminated the groups' standing to challenge the USFS regulations.<sup>405</sup> The district court entered a nationwide injunction against the application of the regulations at issue to any USFS project, which the Ninth Circuit affirmed.<sup>406</sup>

The U.S. Supreme Court reversed, holding in a 5-4 opinion that, for several reasons, the groups no longer had standing.<sup>407</sup> The Court so held because the regulations at issue only governed the conduct of USFS officials, not the environmental groups; the plaintiffs were unable to identify other projects to which the regulations would apply that would impact the plaintiffs' recreational or aesthetic enjoyment; and a general intent by the organizations' members to visit National Forests was too weak to establish standing because no imminent or actual harm was present.<sup>408</sup>

The Court also rejected an argument that the deprivation of a "procedural right" (elimination of the notice, comment, and appeal process for some USFS projects) was enough to create standing.<sup>409</sup>

Deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing. Only a "person who has been accorded a procedural right to protect *his concrete interests* can assert that right without meeting all the normal standards for redressability and immediacy."<sup>410</sup>

Although the procedural right was a result of Congressional action, that was not enough to create standing for Article III purposes (especially for the injury in fact prong).<sup>411</sup>

The dissent believed the organizations put forth sufficient evidence that their members would use parcels that would likely have timber sales without notice, comment, and appeal.<sup>412</sup> Members had used those parcels in the past; so, it was likely there would be future harm to the groups' members.<sup>413</sup> The dissent questioned the majority's stance that there be more specific information about the areas that members would visit (and that would be impacted by USFS regulations).<sup>414</sup> In the dissent's view, there was a "realistic" threat of future harm to the groups' members: "[A] threat of future harm may be realistic even where

---

404. *Id.* at 1148.

405. *Id.*

406. *Id.* (citing *Earth Island Inst. v. Rutherback*, 490 F.3d 687, 696 (9th Cir. 2007)).

407. *Id.* at 1153.

408. *Id.* at 1149-51.

409. *Id.* at 1151.

410. *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)).

411. *Id.*

412. *Id.* at 1156 (Breyer, J., dissenting).

413. *Id.* at 1157.

414. *Id.*

the plaintiff cannot specify precise times, dates, and GPS coordinates.”<sup>415</sup> The dissent noted that the USFS admitted that there were thousands of sites that would be likely targets of future USFS actions exempt from notice, comment and appeal procedures.<sup>416</sup>

## V. DEVELOPMENTS IN INDIANA ENVIRONMENTAL INSURANCE LAW

During the survey period, Indiana courts decided several cases that address a number of important insurance coverage issues pertinent to insurance claims in environmental cases. These cases generally involve disputes regarding an insurer’s duty to defend its insured based, for instance, on notice, policy exclusions, or prior known losses. Although an insurer has the right to defend itself in a coverage lawsuit, this right is not without limits. Because an insured must depend on the insurer’s good faith and performance, Indiana courts have imposed on insurers duties “of good faith and fair dealing.”<sup>417</sup> An insurer’s breach of these duties to its policyholder may be actionable bad faith, but, depending on the situation, an insurer may breach these duties and deny coverage or limit liability.<sup>418</sup>

### A. *The Effect of Delayed Notice on an Insurer’s Duty to Defend*

In *Dreaded, Inc. v. St. Paul Guardian Insurance Co.*,<sup>419</sup> the Indiana Supreme Court, held that an insurer’s duty to defend its insured does not begin until notice has been given to the insurer.<sup>420</sup> After it received a suit letter from the IDEM on November 17, 2000 Dreaded, Inc. took steps to respond to environmental contamination.<sup>421</sup> Dreaded did not tender the claim to its liability insurer, however, until several years had passed. Nonetheless, Dreaded sought reimbursement for costs incurred before the time it notified its insurer of the claim.<sup>422</sup> The insurer agreed to pay defense costs that were incurred after it received notice, but refused to pay any of Dreaded’s defense costs incurred before the notice date.<sup>423</sup> Dreaded disagreed and sued, seeking pre-tender defense costs from its insurer. The insurer fought Dreaded’s claims by arguing that the policy language clearly required prompt notice of a claim and disclaimed liability for financial obligations incurred without the insurer’s consent, thus precluding pre-notice costs.<sup>424</sup> Both sought summary judgment.<sup>425</sup>

---

415. *Id.* at 1156.

416. *Id.*

417. *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515, 520 (Ind. 1993).

418. *See id.* at 518-19.

419. 904 N.E.2d 1267 (Ind. 2009).

420. *Id.* at 1273.

421. *Id.* at 1268-69.

422. *Id.* at 1269.

423. *Id.*

424. *Id.*

425. *Id.*



Both the trial court and the court of appeals found that Dreaded's delay in notifying its insurer was unreasonable, and thus a presumption existed that the delay prejudiced the insurer.<sup>426</sup> The court of appeals further held, however, that because Dreaded had submitted sufficient evidence that the delayed notice did not actually prejudice the insurer a genuine issue of material fact existed that precluded summary judgment for the insurer.<sup>427</sup>

The Indiana Supreme Court reversed, holding that the issue of whether the late notice prejudiced the insurer was "irrelevant" because the true issue was "whether the insurer *had any duty to defend at all*."<sup>428</sup> In this regard, the court noted that the policy was "clear and unambiguous" that the insurer's duty to defend did not begin until the insured informed the insurer of the claim.<sup>429</sup> The court went on to point out that:

[a]n insurer cannot defend a claim of which it has no knowledge. The function of a notice requirement is to supply basic information to permit an insurer to defend a claim. The insurer's duty to defend simply does not arise until it receives the foundational information designated in the notice requirement. Until an insurer receives such enabling information, it cannot be held accountable for breaching this duty.<sup>430</sup>

Thus, the court affirmed the grant of summary judgment to the insurer with regard to pre-notice costs.<sup>431</sup> The *Dreaded* court did indicate, however, that an insurer may not be able to avoid payment of pre-notice costs if the insurer had either disclaimed its duty to defend its insured or had previously received constructive notice of the claim.<sup>432</sup> As such, there may still be situations where, under Indiana law, an insured may be able to recover pre-notice costs from its insurer.

### *B. The Propriety of an Insurer's Reliance on a Pollution Exclusions to Avoid Defense*

Another instance when a coverage dispute may exist between an insured and its insurer is when a policy specifically excludes certain types of claims for

---

426. *Id.*

427. *Id.* (citing *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 878 N.E.2d 467, 474 (Ind. Ct. App. 2007)).

428. *Id.* at 1273 (emphasis added).

429. *Id.* at 1271.

430. *Id.* at 1273.

431. *Id.*

432. *Id.* at 1272-73. See also *Tri-etch, Inc. v. Cincinnati Ins. Co.*, 909 N.E.2d 997, 1004-05 (Ind. 2009) (citing *Dreaded, Inc.*, 940 N.E.2d at 1271-72); *Great N. Ins. Co. v. Precision Plastics of Ind., Inc.*, No. 92A05-0808-CV-500, 2009 WL 2447828, at \*6-7 (Ind. Ct. App. Aug. 11, 2009) (finding that the insurer had an ongoing duty to defend and that in line with *Dreaded*, 909 N.E.2d at 1273, the insurer was not obligated to pay for expenses incurred prior to receiving notice of the claim but was responsible for post-notice costs)).

coverage. In the environmental context, a common policy exclusion is an exclusion for losses arising from “pollutants.”<sup>433</sup> This “pollutant” exclusion can be an “absolute pollution exclusion” or an exclusion that seeks to bar coverage unless a release was “sudden and accidental.”<sup>434</sup> The Indiana Supreme Court has previously found that both forms of the “pollutants” exclusion found in most general liability and excess liability policies are ambiguous, and thus unenforceable.<sup>435</sup> Nonetheless, insurers have still sought to challenge the “ambiguity” of the pollution exclusions and their general obligations to provide coverage to their policyholders.

For instance, in *Royal Crown Bottling Corp. v. Cincinnati Insurance Co.*,<sup>436</sup> the insurer refused to defend its insured, Royal Crown, even under a reservation of rights, based on the presence of a pollution exclusion in its policy.<sup>437</sup> IDEM issued a letter to Royal Crown that required remediation of Royal Crown’s property after discovering contamination. Royal Crown remediated the property and brought a cost recovery action against the former property owners. Royal Crown timely sought defense for the IDEM claim, and the cost recovery claim, from its insurer, the Cincinnati Insurance Company, who refused coverage. Royal Crown sued.

In holding that the insurance company had a duty to defend its insured, the Marion County Superior Court first noted that a cleanup demand received by Royal Crown from IDEM was a “suit” under the policy and triggered the

---

433. See, e.g., *Wolf Lake Terminals, Inc. v. Mut. Marine Ins. Co.*, 433 F. Supp. 2d 933, 948 n.6 (N.D. Ind. 2005); *Freidline v. Shelby Ins. Co.*, 774 N.E.2d 37, 40 (Ind. 2002); *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 947 (Ind. 1996); *Travelers Indemn. Co. v. Summit Corp. of Am.*, 715 N.E.2d 926, 934-35 (Ind. Ct. App. 1999).

434. Sudden and Accidental Pollutant exclusions will generally contain language that states the insurance will not apply to

[b]odily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapor, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases or pollutants into or upon land, the atmosphere or any watercourse or body of water, but this exclusion does not apply if such discharge, dispersal, release or escape is sudden or accidental.

See, e.g., *Seymour Mfg. Co. v. Commercial Union Ins. Co.*, 648 N.E.2d 1214, 1218 (Ind. Ct. App. 1995), *opinion vacated*, 665 N.E.2d 891 (1996). On the other hand, “absolute pollutant exclusions,” typically exclude coverage for most, if not all, pollution-type claims and are usually characterized by broader exclusionary language and lack the “sudden and accidental” exception. See, e.g., *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 946 (Ind. 1996).

435. *Seymour Mfr. Co., Inc. v. Commercial Union Ins. Co.*, 665 N.E.2d 891, 892 (Ind. 1996); *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 949 (Ind. 1996).

436. Cause No. 49D02-0708-PL033992 (Marion Co. Super. Ct. Oct. 27, 2008); see also *Pollution Control Ind., Inc. v. Greenwich Ins. Co.*, (Lake County Sup. Ct., Aug. 26, 2008) (awarding attorney fees to insured when insurer refused to defend based on pollution exclusion).

437. *Royal Crown Bottling Corp.*, Cause No. 49D02-0708-PL033992 (Marion Co. Super. Ct. Oct. 27, 2008).



insurer's duty to defend.<sup>438</sup> The court then pointed out that Indiana courts had consistently held that pollution exclusions like that at issue were ambiguous<sup>439</sup> and that the insurer should have been well aware of this fact. The court went on to hold that an exclusion that removed coverage for damage to property Royal Crown owned, rented, or occupied also did not preclude liability coverage to third parties like IDEM.<sup>440</sup> As such, the court held that an award of attorney fees to Royal Crown pursuant to Indiana Code section 34-52-1-1(b)<sup>441</sup> was proper as this was the only way to make the policyholder whole.<sup>442</sup>

### C. *The Duty to Defend and Known Loss Doctrine*

During the survey period, the Indiana Court of Appeals issued a decision in *Crawfordsville Square, LLC v. Monroe Guaranty Insurance Co.*,<sup>443</sup> regarding the insurer's duty to defend when the insurer has denied coverage because a known loss existed before the issuance of a policy. In that case, Crawfordsville Square bought a property where dry cleaners and gas tanks were located.<sup>444</sup> Before the sale, the insured found out about site contamination and wrote a letter to the seller demanding that funds be put in escrow to pay for the cleanup.<sup>445</sup> After the sale,

---

438. *Id.* at \*14. The court also noted that an insurer is jointly and severally liable for *all* of its insured's costs and not a pro-rate share, regardless of whether the policy stated the insurer would pay "those sums" or "all sums" that the insured became obligated to pay. *Id.* at \*16 (citing *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049, 1056 (Ind. 2001)). The court rejected Cincinnati's assertion that "those sums" language was different than the more traditional "all sums" policy language and that the presence of "those sums" language allowed for the allocation of damages among different insurers. *Id.* The court viewed "those sums" as similar to "all sums" policy language, meaning the entire claim could be covered by Royal Crown's policy, even though the damage took place outside Cincinnati's policy period. *Id.* As such, Cincinnati was ordered to pay all of Royal Crown's damages, up to the policy limits. *Id.*

439. *Id.* at \*10-11. Based on Indiana precedent in *American States Insurance Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996) and *Seymour Manufacturer Co. v. Commercial Union Insurance Co.*, 665 N.E.2d 891 (Ind. 1996), the court found that the pollution exclusions were ambiguous. In reaching this conclusion, the court discussed the definition of "pollutants" in the policy, which included petroleum products and by-products within it (but not petroleum by itself). The court found that the definition was overbroad, and if strictly applied, could negate "virtually all coverage." *Id.* at \*10. Furthermore, the court stated that "Cincinnati's addition of a sentence at the end of its 'pollutants' definition stating that pollutants 'include but are not limited to' substances generally recognized as harmful or toxic to people, property or the environment exacerbates the overbreadth." *Id.* at \*11.

440. *Id.* at \*20.

441. IND. CODE § 34-52-1-1(b) (2008) authorizes an award of attorney fees if a position advanced in litigation is "unreasonable, or groundless."

442. *Id.* at \*22-23

443. 906 N.E.2d 934 (Ind. Ct. App. 2009).

444. *Id.* at 936.

445. *Id.*

Crawfordsville Square added the parcel to its insurance policy with Monroe, but did not tell Monroe about the contamination or potential existence of contamination at the property.<sup>446</sup> Several years later, an environmental consultant reported evidence of contamination on the site to IDEM. IDEM then notified Crawfordsville Square of the contamination and required Crawfordsville Square to investigate and clean up the property.<sup>447</sup> Crawfordsville Square then sued the former owners, and sought defense costs from its insurer, Monroe Guaranty Insurance Company. Monroe, however, denied that it had a duty to defend Crawfordsville Square and sued for a declaratory judgment as to this issue.<sup>448</sup>

In granting summary judgment to Monroe, the court held that if an insured knows or is “substantially certain” that a loss will happen “on or before the effective date of the policy, the known loss doctrine will bar coverage.”<sup>449</sup> In this regard, the court of appeals held that Crawfordsville Square’s letter to the seller of the subject property noting that remediation of contamination was required by Indiana law and seeking the establishment of an escrow account for clean-up was enough to show that Crawfordsville Square knew about the contamination (and therefore knew about the possibility of probable loss).<sup>450</sup> But the court was careful to point out “that the mere presence of a dry cleaning business” does not “invariably lead[]” to the conclusion that a party had knowledge of actionable contamination of the land on which it sits.<sup>451</sup>

*D. Defense Obligations When Policies, or Rights Under Policies,  
Are Assigned*

In *Travelers Casualty & Surety Company v. U.S. Filter Corp.*,<sup>452</sup> the Indiana Supreme Court reaffirmed the “widely recognize[d]” rule that an insured can assign to a third party insurance coverage rights arising out of a liability claim after the claim is known or identified. The court made clear that such assignments could take place even if the liability policies expressly forbid assignments without the insurer’s consent.<sup>453</sup> The court also clarified that this rule did not apply to assignments of insurance policies or coverage rights in the context of latent product liability claims not yet known or identified at the time of the assignment.<sup>454</sup> This case involved “a complex ownership history” of Wheelabrator<sup>455</sup> machines “spanning nearly a hundred years.”<sup>456</sup> Following the

---

446. *Id.*

447. *Id.*

448. *Id.* at 936-37.

449. *Id.* at 938 (quoting STEVEN PLITT, COUCH ON INSURANCE § 102:8, at 21, 23 (3d ed. 1997)).

450. *Id.* at 938-40.

451. *Id.* at 941.

452. 895 N.E.2d 1172, 1178-79 (Ind. 2009) (*U.S. Filter*).

453. *Id.* at 1180-81.

454. *Id.*

455. A Wheelabrator is “an airless blast machine, developed to mechanically clean pieces of



initiation of various product liability lawsuits relating to the exposure to silica from the machines, several companies sued the insurers of the machines' owners.<sup>457</sup> The insurance policies in dispute had been issued to corporate predecessors and contained provisions requiring the insurers' consent to transfers or assign merits of certain policy rights.<sup>458</sup> The insurers argued that neither the policies nor rights under the policies at issue were transferred to the plaintiffs through corporate transactions.<sup>459</sup> The plaintiffs, however, argued that rights under the policies were transferred to them through various transactions.<sup>460</sup>

After reviewing the written transaction agreements, the court of appeals found that the alleged exposure injuries had been assigned as choses in action under the general rule expressed above.<sup>461</sup> The Indiana Supreme Court reversed, holding that the policies were not transferred by one of the predecessors in interest as the policies were not listed in any of the assets to be transferred in a 1986 transaction.<sup>462</sup> Furthermore, the court held that, although a separate 1996 corporate transaction did list the insurance policies as a transferred asset, the predecessors offered no evidence of compliance with policy provisions governing assignment.<sup>463</sup>

The corporations argued that these policy provisions did not preclude the assignment of the insurance assets because the claims were "choses in action" at the time of the assignment.<sup>464</sup> The Indiana Supreme Court noted that some courts in other jurisdictions have allowed the transfer of policies without consent<sup>465</sup> while others have disallowed the transfer.<sup>466</sup> The Indiana Supreme Court adopted the view that disallowed transfer in this context because the injuries for which coverage was sought had not been reported at the time of the corporate transactions; therefore they were not assignable choses in action.<sup>467</sup>

---

metal in a way that, relative to traditional sandblasting methods, dramatically reduces . . . manpower and the release of silica." *Id.* at 1175 n.1.

456. *Id.* at 1175.

457. *Id.* at 1174-76.

458. *Id.* at 1175.

459. *Id.* at 1176.

460. *Id.*

461. *Id.*

462. *Id.* at 1177 (finding that because transferor did not list the predecessor's insurance policies as an asset being transferred, the predecessor remained the owner of the policies).

463. *Id.* at 1178-80.

464. *Id.* at 1178.

465. *Id.* at 1179 (citing *N. Ins. Co. of N.Y. v. Allied Mut. Ins. Co.*, 955 F.2d 1353 (9th Cir. 1992); *Egger v. Gulf Ins. Co.*, 903 A.2d 1219 (Pa. 2006); *Gopher Oil Co. v. Am. Hardware Mut. Ins. Co.*, 588 N.W.2d 756 (Minn. Ct. App. 1999)).

466. *Id.* (citing *Henkel Corp. v. Hartford Accident & Indem. Co.*, 62 P.3d 69 (Cal. 2003)).

467. *Id.* at 1178-80.

*E. The Insured's Evidentiary Requirements to Demonstrate Its Insurer Acted in Bad Faith*

The Indiana Court of Appeals addressed the issue of bad faith, and the evidence necessary to prevail on this type of claim in *Sadler v. Auto-Owners Insurance Co.*<sup>468</sup> In that case, the insured, Sadler, sought costs and expenses of an environmental clean-up occasioned by leakage from underground petroleum storage tanks from its insurer, Auto-Owners Insurance Co.<sup>469</sup> A dispute over payment of the defense costs arose and Sadler sued Auto-Owners claiming Auto-Owners breached its duty of good faith and fair dealing.<sup>470</sup> Auto-Owners responded by claiming that it had not acted in bad faith and by arguing that Sadler had not suffered any "adverse financial effects" because she had elected to pursue "such costs and expenses" from other insurance companies instead of Auto-Owners.<sup>471</sup> The insurer further argued bad faith did not exist because there was no coverage under Auto-Owner's policies because the contamination occurred after the policies from Auto-Owners had expired.<sup>472</sup>

The trial court granted summary judgment to Auto-Owners on Sadler's claim of bad faith.<sup>473</sup> On appeal, Sadler argued that Auto-Owners "sent inconsistent and ambiguous communications" to her, improperly reduced its settlement offers over time, and eventually wrongfully denied her claim.<sup>474</sup> The court of appeals disagreed, noting that insurance companies have a right to fully investigate claims and deny them with good cause.<sup>475</sup> The court further held that Indiana courts will only step in and allow bad faith claims when the insurance company commits some act of "conscious wrongdoing."<sup>476</sup> As such, an insured must present "evidence of a state of mind reflecting dishonest purpose, moral obliquity, furtive design, or ill will."<sup>477</sup> The court opined that such evidence did not exist because the changes in Auto-Owners' position appeared to result from later discoveries of new policies or confusion pertaining to the insurer's limited agreement to pay a percentage of certain specified costs while it continued to investigate general coverage.<sup>478</sup> As such, *Sadler* indicates that an insured wishing to recover damages against their insurance company for bad faith must specifically assert facts showing the element of conscious wrongdoing.

---

468. 904 N.E.2d 665 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 548 (Ind. 2009).

469. *Id.* at 667.

470. *Id.*

471. *Id.*

472. *Id.*

473. *Id.* at 668.

474. *Id.* at 672.

475. *Id.* at 673.

476. *Id.*

477. *Id.* (citing *Colley v. Ind. Farmers Mut. Ins. Group*, 691 N.E.2d 1259, 1261 (Ind. Ct. App. 1998)).

478. *Id.* at 672-73.



### CONCLUSION

Significant decisions filled the survey period, including U.S. Supreme Court clarification on joint and several liability, a substantial plaintiffs' jury verdict under the Clean Air Act, and numerous decisions under state law theories. Courts also continue to wrestle with insurance coverage of environmental liabilities. Yet courts left considerable room for future litigation. Some time may pass before the clouds begin to clear for environmental practitioners.





# RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW

## OCTOBER 1, 2008 – SEPTEMBER 30, 2009

PAUL C. SWEENEY\*  
EMMANUEL V.R. BOULUKOS\*\*

### INTRODUCTION

The Indiana Rules of Evidence (“Rules”) went into effect January 1, 1994. Since that time, judicial decisions and statutory amendments have refined these Rules. This Article explains the developments in Indiana evidence law during the period of October 1, 2008 through September 30, 2009.<sup>1</sup> The discussion topics track the order of the Rules.

### I. GENERAL PROVISIONS (RULES 101 – 106)

#### A. General Overview

Pursuant to Rule 101(a), the Rules apply to all court proceedings in Indiana except when “otherwise required by the Constitution of the United States or Indiana, by the provisions of this rule, or by other rules promulgated by the Indiana Supreme Court.”<sup>2</sup> Common law and statutory law continue to apply to specific issues not covered by the Rules.<sup>3</sup>

Judge Robert L. Miller, Jr., of the U.S. District Court for the Northern District of Indiana, succinctly summarized the preliminary issues/questions affecting admissibility of evidence as the following:

- Is this issue covered by an Evidence Rule? If not (but only if not), is the issue covered by a statute or by pre-Rule case law?
- Is this a preliminary issue of fact to be decided by the judge rather than by the fact-finder, and so not governed by the Evidence Rules except those

---

\* Of Counsel, Ice Miller LLP. B.A., 1994, Indiana University—Bloomington; J.D., *magna cum laude*, Indiana University School of Law—Indianapolis.

\*\* Associate, Ice Miller LLP. B.A., 2001, University of Massachusetts—Amherst; M.A., 2003, University of Texas—Austin; J.D., 2008, Indiana University School of Law—Bloomington.

1. The authors did not include *Ford Motor Co. v. Moore*, 905 N.E.2d 418 (Ind. Ct. App.), *trans. granted*, 919 N.E.2d 552 (Ind. 2009) or *Beldon v. State*, 906 N.E.2d 895 (Ind. Ct. App. 2009), *trans. granted*, 919 N.E.2d 556 (Ind. 2009), *vacated by* No. 43505-0910-CR-496, 2010 WL 1790456 (Ind. May 5, 2010) in this Article because the Indiana Supreme Court vacated these opinions by granting transfer. See IND. APP. R. 58(A). The authors likewise did not include *Sibbing v. Cave*, 901 N.E.2d 1155 (Ind. Ct. App.) (discussing Rules 413, 701, 801, 802 and 803), *trans. granted*, 915 N.E.2d 993 (Ind. 2009), *opinion vacated*, 922 N.E.2d 594 (Ind. 2010) or *Lafayette v. State*, 899 N.E.2d 736 (Ind. Ct. App.) (discussing Rule 404(b) and Sixth Amendment issues), *trans. granted*, 917 N.E.2d 660 (Ind.), *opinion vacated*, 917 N.E.2d 666 (Ind. 2009) in this Article. The Indiana Supreme Court decisions fall into the subsequent survey period.

2. IND. R. EVID. 101(a).

3. *Id.*

concerning privilege?

- If this is a sentencing hearing and so not governed by the Evidence Rules, is the evidence against the accused reliable, and so consistent with principles of due process?<sup>4</sup>

*B. Situations in Which Use of Evidentiary Rules Is Limited*

In probation and community corrections placement revocation hearings, “judges may consider any relevant evidence bearing some substantial indicia of reliability.”<sup>5</sup> In *Monroe v. State*,<sup>6</sup> Monroe challenged the admissibility of certain hearsay evidence and the sufficiency of the evidence as a whole to support the revocation of his placement on home detention. At the revocation hearing, a Delaware County Community Corrections Supervisor testified about officers finding a forty-caliber handgun in the bottom of the refrigerator at the home where Monroe lived while on home detention after his Class D felony conviction.<sup>7</sup> While community corrections placement revocation hearings must meet certain due process requirements, the proceeding, the court noted, did not need to be equated with an adversarial criminal proceedings.<sup>8</sup> Accordingly, pursuant to Rule 101(c), the Rules in general, and the rules against the admission of hearsay evidence in particular, did not apply.<sup>9</sup> Thus, the trial court properly considered the hearsay testimony presented at the revocation hearing. Because the trial court did not wrongfully consider hearsay testimony and sufficient evidence existed demonstrating Monroe’s constructive handgun possession, the court affirmed the trial court’s revocation of Monroe’s home detention.<sup>10</sup>

Similarly, in *Peterson v. State*,<sup>11</sup> the Indiana Court of Appeals found that the trial court had not erred when it admitted a report produced from a polygraph examination of the defendant, indicating that he had violated his probation terms by viewing pornography.<sup>12</sup> Testimony by the defendant’s mental health counselor, who viewed a videotape of the polygraph and testified that the transcript matched what she saw, was sufficient to establish the reliability of the challenged evidence.<sup>13</sup>

In certain circumstances a party can, by its wrongdoing, forfeit his ability to

---

4. ROBERT L. MILLER, JR., INDIANA PRACTICE SERIES: COURTROOM HANDBOOK ON INDIANA EVIDENCE 5 (2009).

5. *Monroe v. State*, 899 N.E.2d 688, 691 (Ind. Ct. App. 2009) (citing *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999)).

6. *Id.* at 691-92.

7. *Id.*

8. *Id.* at 691.

9. *Id.*

10. *Id.*

11. 909 N.E.2d 494 (Ind. Ct. App. 2009).

12. *Id.* at 497-98.

13. *Id.* at 499.



object to the admission of certain evidence. In *Roberts v. State*,<sup>14</sup> the trial court allowed testimony from co-workers and friends of the deceased, Faith Vanarsdale, that she had told them of her boyfriend's threats to kill her. Dana Roberts, sentenced to sixty-two years for murdering Vanarsdale, contended that the trial court erred in admitting the evidence because it violated his Sixth Amendment right to confrontation and because it constituted inadmissible hearsay under Indiana's Evidence Rules.<sup>15</sup> The trial court ruled that the statements did not implicate the Sixth Amendment because they were not testimonial.<sup>16</sup> The Indiana Court of Appeals, for argument's sake, assumed that the statements were inadmissible hearsay but went on to conclude that any objection to the admissibility of the statements was forfeited by Roberts via his wrongdoing—the murder of the declarant.<sup>17</sup> The *Roberts* case affirmed the principle articulated in *Boyd v. State*,<sup>18</sup> that the common law doctrine of forfeiture by wrongdoing applied to objections made pursuant to the Rules.<sup>19</sup>

The Indiana Court of Appeals, in *Kimbrough v. State*, reiterated a number of general evidence concepts including: (1) under Rule 103, error may not be predicated upon a ruling that admits or excludes evidence unless a substantial right of a party is affected;<sup>20</sup> (2) trial courts have broad discretion to admit or exclude evidence;<sup>21</sup> (3) appellate courts review decisions to admit or exclude evidence on an abuse of discretion standard;<sup>22</sup> and (4) a decision constitutes an abuse of discretion when it "is clearly against the logic, facts, and circumstances presented."<sup>23</sup> The court also dealt with waiver of issues in the context of the admission of a taped 911 call.<sup>24</sup>

The defendant argued on appeal that the trial court erred in admitting the 911 call, made immediately after the incident underlying the defendant's conviction. Although the defendant had filed a motion in limine asserting a number of grounds for exclusion of the evidence,<sup>25</sup> at trial he objected only on the basis that

---

14. 894 N.E.2d 1018 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1233 (Ind. 2008).

15. *Id.* at 1022-27.

16. *Id.* at 1024.

17. *Id.*

18. 866 N.E.2d 855, 857 (Ind. Ct. App. 2007).

19. *Roberts*, 894 N.E.2d at 1025 (citing *Boyd*, 866 N.E.2d at 857 (citing Rule 101(a) ("If these rules do not cover a specific evidence issue, common or statutory law shall apply."); Rule 802 (excluding the admission of hearsay except as provided by law or by the Indiana Rules of Evidence))).

20. 911 N.E.2d 621, 631 (Ind. Ct. App. 2009).

21. *Id.*

22. *Id.*

23. *Id.* (citing *Platt v. State*, 589 N.E.2d 222, 229 (Ind. 1992)).

24. *Id.* at 631-32.

25. Defendant filed a motion in limine objecting to the evidence on four bases: (1) that the evidence was overly cumulative; (2) that the admission of the evidence violated the defendant's right to confrontation under article I, section 13 of the Indiana Constitution; (3) that the evidence constituted inadmissible hearsay; and (4) that the evidence was prejudicial. *Id.*

the call was cumulative. Finding the defendant waived all other objections to the tape, and finding that the tape was neither cumulative nor “inflammatory or unduly prejudicial in any way,”<sup>26</sup> the court concluded that there was no error in the admission of the evidence.<sup>27</sup>

### C. Formal Offer of Proof

In *Griffith v. State*,<sup>28</sup> Griffith appealed his convictions for criminal recklessness, intimidation, and battery, in part asserting that the trial court abused its discretion<sup>29</sup> by excluding his alleged hearsay statements, which statements he claimed illustrated “the real reason why” the victim was at his duplex.<sup>30</sup> According to Rule 103(a)(2),

[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . (2) [in the] case [where] the ruling is one excluding evidence, the substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked.<sup>31</sup>

An offer of proof preserves an error in the exclusion of a witness’s testimony and allows the trial and appellate courts to determine the admissibility of the testimony and the potential for prejudice if it is excluded.<sup>32</sup> However, Rule 103(a)(2) does not require an offer of proof if the substance of the evidence “was apparent from the context within which questions were asked.”<sup>33</sup> Based on the record, the court determined that Griffith failed to make an offer of proof in accordance with Rule 103.<sup>34</sup>

### D. Relevancy Conditioned on Fact

In *Lewis v. State*,<sup>35</sup> Lewis appealed his conviction for marijuana possession, alleging that the court should not have admitted evidence of marijuana seized from the defendant because the State had failed to properly admit the warrant for arrest which precipitated and led to the discovery of the marijuana.<sup>36</sup> In a bench trial, Officer Eldridge testified that he was dispatched to a gas station on a report

---

26. *Id.*

27. *Id.* at 635.

28. 898 N.E.2d 412 (Ind. Ct. App. 2008).

29. Indiana’s trial courts hold broad discretion in ruling on the admission or exclusion of evidence at trial and will only be overturned with a finding of abuse of discretion. *Platt v. State*, 589 N.E.2d 222, 229 (Ind. 1992); *Sallee v. State*, 785 N.E.2d 645, 650 (Ind. Ct. App. 2003).

30. *Id.* at 413, 416.

31. IND. R. EVID. 103(a).

32. *See Dowdell v. State*, 720 N.E.2d 1146, 1150 (Ind. 1999).

33. IND. R. EVID. 103(a)(2).

34. *Griffith*, 898 N.E.2d at 416.

35. 904 N.E.2d 290 (Ind. Ct. App. 2009).

36. *Id.* at 291.



of “trouble with a person.”<sup>37</sup> Upon arriving at the scene, Lewis was arrested—not because of any action observed by the officer but due to a pre-existing arrest warrant. A search revealed a baggie of marijuana in Lewis’s pocket.<sup>38</sup> Although not challenging the validity of the warrant, Lewis argued that the trial judge erred in allowing testimony about the marijuana because the State did not introduce the warrant and therefore failed to establish the basis for the search.<sup>39</sup> In this case of first impression, the Indiana Court of Appeals held that the State did not hold an affirmative obligation to provide a criminal defendant with a warrant that leads to a search incident to an arrest and that Lewis had not been deprived of his right to challenge the validity of the warrant.<sup>40</sup> Lewis alternatively claimed the testimony of Officer Eldridge’s testimony was inadmissible hearsay. Citing to its previous decision in *Williams v. State*,<sup>41</sup> the court of appeals held that Officer Eldridge’s testimony was not hearsay but was, instead, a preliminary matter governed by Rule 104(a):

In the context of a criminal investigation, we have held that “[a]n out-of-court statement introduced to explain why a particular course of action was taken during a criminal investigation is not hearsay because it is not offered to prove the truth of the matter asserted.” Here, [the arresting officer] was not an out-of-court declarant, and he did not testify as to the truth of any out-of-court statement; rather, he testified in court as to his observation of an active warrant for [defendant’s] arrest and the course of action that he took as a result.<sup>42</sup>

Lewis argued that if the trial court did not admit Officer Eldridge’s testimony to prove the truth of the matter asserted, then no evidence existed of the warrant and, therefore, no basis for admitting of the marijuana evidence. The Indiana Court of Appeals held that to the extent Officer Eldridge’s testimony was offered to establish the existence of a warrant, that evidence concerned the admissibility of marijuana. The warrant “was not an element of the State’s case.”<sup>43</sup> Rather, in accordance with Rule 104, it pertained “only to the admissibility of evidence obtained under the warrant.”<sup>44</sup> “Preliminary questions concerning . . . the admissibility of evidence shall be determined by the Court. . . . In making its determination, it is not bound by the Rules of Evidence, except those with respect

---

37. *Id.*

38. *Id.*

39. *Id.* at 292.

40. *Id.* at 292-93. Although the warrant was referenced by cause number in the probable cause affidavit, Lewis had not made a discovery request for the warrant. Moreover there was no evidence of any effort by Lewis to obtain the warrant and no evidence of any discovery violation by the State. *Id.* at 293.

41. 898 N.E.2d 400, 403 n.1 (Ind. Ct. App. 2008). This case is discussed below with regards to the Rule 801 discussion in the same.

42. *Lewis*, 904 N.E.2d at 293 (quoting *Williams*, 898 N.E.2d at 403 n.1 (citation omitted)).

43. *Id.*

44. *Id.* (quoting *Guajardo v. State*, 496 N.E.2d 1300, 1303 (Ind. 1986)).

to privileges.”<sup>45</sup> Rule 104(a) therefore permitted the trial court to consider Officer Eldridge’s potentially hearsay evidence when ruling on the admissibility of marijuana evidence.

### *E. The Rule of Completeness*

In *Farmer v. State*, the defendant stood accused of Class A attempted rape, Class A felony burglary, Class C felony robbery, Class D felony criminal confinement, and Class D felony criminal recklessness.<sup>46</sup> The charges arose from a single incident in which Charles Farmer followed a Noblesville, Indiana woman home from a Wal-Mart. He then proceeded to rob her, attempt to rape her, and hold her captive for several hours.<sup>47</sup> After the incident, Farmer fled to Utah, where local police ultimately arrested and interrogated him.<sup>48</sup> At trial, the officer who interrogated Farmer in Utah testified regarding admissions that Farmer made to her.<sup>49</sup> The court granted the State’s motion to bar Farmer’s self-serving statements made during his interrogation.<sup>50</sup>

On appeal, Farmer, citing Rule 106, argued that the trial court erred in barring his self-serving statements.<sup>51</sup> The Indiana Court of Appeals determined that because Rule 106 applied only to writings and recordings and not oral conversations, it did not require admission of the self-serving statements,<sup>52</sup> but the common law doctrine of completeness applied to oral conversations.<sup>53</sup> Therefore, the trial court should have admitted Farmer’s statements.<sup>54</sup>

Nevertheless, the court of appeals did not reverse the trial court’s ruling because Farmer failed to make an offer of proof with regard to the improperly excluded evidence. Under Rule 103(a)(2), advocates may not predicate error upon a ruling excluding evidence unless the substance of the evidence was made known to the court by an “offer of proof, or was apparent from the context within which questions were asked.”<sup>55</sup> Thus, by neglecting to make an offer of proof, Farmer failed to preserve the error.<sup>56</sup> Moreover, even if he had preserved the error, the error would not require reversal because the statements at issue were

---

45. *Id.*; see MILLER, *supra* note 4, § 104.102, at 112 (“Rule 104(a) expressly provides that the trial court is not bound [by] any evidence rules other than those with respect to privileges. Thus, for example, a trial judge may consider inadmissible hearsay . . . in deciding a motion to suppress evidence in a criminal case . . .”).

46. 908 N.E.2d 1192, 1194 (Ind. Ct. App. 2009).

47. *Id.* at 1194-95.

48. *Id.* at 1196.

49. *Id.* at 1197.

50. *Id.* at 1200.

51. *Id.*

52. *Id.*

53. *Id.* (citing *Lewis v. State*, 754 N.E.2d 603, 607 (Ind. Ct. App. 2001)).

54. *Id.*

55. *Id.* at 1201.

56. *Id.*



self-serving statements, and the defendant had the opportunity to tell his version of events and to explain the statements he made to the officer during his interrogation.<sup>57</sup>

## II. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS (RULE 301)

In *Bonilla v. Commercial Services of Perry, Inc.*,<sup>58</sup> Bonilla challenged the trial court's presumptions regarding evidence.<sup>59</sup> The defendants utilized Indiana Code section 33-42-2-6 to establish the presumption that Bonilla signed certain notarized mortgages at issue in the case. The trial court allowed Bonilla to introduce evidence to rebut the presumption, but it found Bonilla's evidence to be unpersuasive and insufficient.<sup>60</sup>

As previously established by the Indiana Supreme Court, in *Schultz v. Ford Motor Co.*,<sup>61</sup> Rule 301 mandates that "the finder of fact would be required to find the presumed fact once the basic fact is established, unless the opponent of the presumption persuaded the factfinder of the nonexistence of the presumed fact."<sup>62</sup> Under this approach, a presumption "met by rebutting evidence effectively becomes an inference under Rule 301."<sup>63</sup> "An inference remains in the case despite the presentation of contrary proof and may be weighed with all the other evidence."<sup>64</sup> Applying Rule 301 and *Shultz*, the Indiana Court of Appeals held that the trial court in *Bonilla*, after weighing all of the evidence, did not err when it held that Bonilla failed to rebut the presumption.<sup>65</sup>

In *Daisy v. Sharp*,<sup>66</sup> Kelly Daisy asserted that the trial court abused its discretion when it denied her petition to change the name of her minor daughter, M.S., to include her surname.<sup>67</sup> Finding that the father had failed to establish that he had met statutory requirements which would have allowed the trial court's application of the presumption set forth in Indiana Code section 34-28-2-4(d),<sup>68</sup> the court remanded the case to the trial court reweigh the evidence without application of the presumption.<sup>69</sup>

---

57. *Id.* at 1201 (citing *McElroy v. State*, 553 N.E.2d 835, 840 (Ind. Ct. App. 2009)).

58. 900 N.E.2d 22 (Ind. Ct. App. 2009).

59. *Id.* at 23, 27.

60. *Id.* at 27.

61. 857 N.E.2d 977, 982-83 (Ind. 2006).

62. *Id.* at 982 (citations omitted).

63. *Bonilla*, 900 N.E.2d at 27 (quoting *MILLER*, *supra* note 4, § 301.101, at 229 (3d ed. 2007)).

64. *Id.* (quoting *MILLER*, *supra* note 4, § 301.101, at 22 (3d ed. 2007)).

65. *Id.* at 28.

66. 901 N.E.2d 627 (Ind. Ct. App. 2009).

67. *Id.* at 630.

68. *Id.* at 632.

69. *Id.* at 631-32.

## III. RELEVANCY AND ITS LIMITS OF THE CONCEPT (RULES 401 – 413)

## A. Irrelevant Evidence

In *Ward v. State*, the Indiana Supreme Court affirmed the death sentence of defendant Roy Lee Ward, who was convicted of the rape and murder of a fifteen-year-old girl.<sup>70</sup> Among the issues presented on appeal was whether the trial court erred in allowing the admission of graphic photographs of the victim's body, including photographs taken after she had received medical treatment and post her autopsy.<sup>71</sup> Generally, photos of a victim's injuries are inadmissible.<sup>72</sup> Specifically, autopsy photos are generally inadmissible in order to avoid risking a mistaken inference that the defendant caused the autopsy incisions. However, such photos may be admitted when accompanied by testimony explaining what has been done to the body.<sup>73</sup> The trial court did not err in admitting the photos because sufficient explanatory testimony accompanied the admission of the photographs.<sup>74</sup>

In *Roberts v. State*,<sup>75</sup> Roberts argued that the trial court abused its discretion when it admitted into evidence the testimony of the murder victim's daughter, T.R.<sup>76</sup> On appeal, Roberts alleged that the testimony was not relevant and was introduced for the purpose of creating "sympathy with the jury regarding the death of [her mother]."<sup>77</sup> However, Roberts failed to object to this evidence at trial and as a result waived this issue for appeal.<sup>78</sup> Even if the defendant had not waived the issue, the court determined that the evidence would have been relevant because it confirmed that Roberts was at the scene of the murder and thus was admissible pursuant to Rule 401.

In *Pitts v. State*,<sup>79</sup> Pitts appealed his conviction and sentence for murder alleging that the trial court failed to permit him to present a defense.<sup>80</sup> Pitts made several offers of proof related to his defense theory that someone else committed the murder in question.<sup>81</sup> "[A] defendant has a right to present evidence tending to show that someone other than the accused committed the charged crime."<sup>82</sup> However, the evidence that a defendant wishes to present must be relevant.

---

70. 903 N.E.2d 946, 950 (Ind.), *aff'd on reh'g*, 908 N.E.2d 595 (Ind. 2009), *cert. denied*, *Ward v. Indiana*, 130 S. Ct. 2060 (2010).

71. *Id.* at 957-58.

72. *Id.* at 958 (citing *Corbett v. State*, 764 N.E.2d 622, 627 (Ind. 2002)).

73. *Id.* (citations omitted).

74. *Id.* at 958-59.

75. 894 N.E.2d 1018 (Ind. Ct. App. 2008).

76. *Id.* at 1027.

77. *Id.*

78. *Id.*

79. 904 N.E.2d 313 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 922 (Ind. 2009).

80. *Id.* at 318.

81. *Id.* at 318-19.

82. *Id.* at 318 (quoting *Allen v. State*, 813 N.E.2d 349, 361 (Ind. Ct. App. 2004)).



“Evidence is relevant when it has ‘any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’”<sup>83</sup> The court cited an Indiana Supreme Court holding that “evidence which tends to show that someone else committed the crime logically makes it less probable that the defendant committed the crime, and thus meets the definition of Rule 401.”<sup>84</sup> The court held that the evidence proffered by Pitts failed to show, or even imply, that someone else committed the murder. Thus, the trial court did not commit reversible error in excluding the evidence.<sup>85</sup>

In *Hinds v. State*,<sup>86</sup> Hinds appealed his conviction for operating a vehicle while intoxicated arguing, in part, that the trial court improperly admitted certain field sobriety tests administered by the Indiana State Police.<sup>87</sup> Hinds contended that finger-to-nose and backward count tests were irrelevant. Citing Rules 401 and 402, the court found the evidence relevant, even though it only had a slight tendency to make a fact more or less probable.<sup>88</sup> The fact that the tests were not standardized did not “render them irrelevant.”<sup>89</sup>

In *Kimbrough v. State*, the defendant objected to testimony by his victim, James Peoples, concerning the pain that Peoples suffered after Kimbrough attacked him with a wooden table-leg.<sup>90</sup> Kimbrough argued that the evidence did not meet the relevancy threshold demanded by Rule 401.<sup>91</sup> The charge against Kimbrough was battery with a deadly weapon.<sup>92</sup> This charge, Kimbrough pointed out, failed to involve the infliction of a serious bodily injury.<sup>93</sup> The Indiana Court of Appeals quoted the rule, stating that “evidence is relevant if it has ‘any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’”<sup>94</sup> With respect to the charge against the defendant, the court explained that the definition of a “deadly weapon” is “an object that, in the way it is used, is readily capable of causing serious bodily injury.”<sup>95</sup> The court went on to explain that “serious bodily injury includes ‘extreme pain.’”<sup>96</sup> Thus, “the amount of time that Peoples was in pain from the injury that Kimbrough inflicted with the table leg was relevant to whether the object constituted a

---

83. *Id.* (quoting *Smith v. State*, 754 N.E.2d 502, 504 (Ind. 2001) (quoting Rule 401)).

84. *Id.* (quoting *Smith*, 754 N.E.2d at 504).

85. *Id.* at 319.

86. 906 N.E.2d 877 (Ind. Ct. App. 2009).

87. *Id.* at 879.

88. *Id.* at 880-81.

89. *Id.* at 881.

90. 911 N.E.2d 621, 622 (Ind. Ct. App. 2009).

91. *Id.*

92. *Id.* at 626.

93. *Id.* at 633.

94. *Id.* (quoting IND. R. EVID. 401).

95. *Id.* (citing IND. CODE § 35-41-1-8(a)(2) (2008)).

96. *Id.* (citing IND. CODE. § 35-41-25 (2008)).

deadly weapon.”<sup>97</sup>

*Spar v. Cha* presented the question of whether, in a medical malpractice action, evidence of a patient’s prior informed consent is admissible under Rules 401, 402, and 403.<sup>98</sup> Plaintiff alleged that the defendant doctor had performed laparoscopic surgery without obtaining the plaintiff’s informed consent.<sup>99</sup> During the surgery, the plaintiff suffered a perforated bowel.<sup>100</sup> The trial court allowed the defendant doctor to introduce evidence of plaintiff’s informed consent to similar prior surgeries.<sup>101</sup> The Indiana Supreme Court affirmed. The court explained that the evidence was relevant to two issues presented at trial: (1) to what extent the defendant was required to disclose risks of the surgery, and (2) whether the plaintiff would have chosen to forego the surgery had the defendant fully apprised her of all risks.<sup>102</sup>

### *B. Probative Value Versus Unfair Prejudice*

In *Pelley v. State*,<sup>103</sup> the defendant, Pelley, argued that the trial court erred by excluding evidence of a third party motive for the murders of Pelley’s father, stepmother, and stepsisters.<sup>104</sup> In upholding the exclusion of this evidence, the Indiana Supreme Court first noted that evidence of third party intent is relevant and thus generally admissible under Rule 401.<sup>105</sup> Where its probative value is outweighed by its prejudicial effect, however, such evidence stands subject to exclusion under Rule 403. For evidence of third-party motive to be admissible, the defendant must show a “connection between the third party and the crime.”<sup>106</sup> Because Pelley failed to establish such a connection, the trial court properly deemed the evidence inadmissible.<sup>107</sup>

In *Bassett v. State*, Bassett objected to the testimony of two men who were incarcerated with him in the Bartholomew County Jail as he awaited resolution of the charges against him.<sup>108</sup> The witnesses, Clarence Johnson and Jimmy Wiles, each testified that Bassett had asked them to kill Chief Deputy Prosecutor Kathleen Burns, who had principal responsibility for Bassett’s prosecution.<sup>109</sup>

---

97. *Id.* at 633-34.

98. 907 N.E.2d 974, 976 (Ind. 2009).

99. *Id.* at 977-78.

100. *Id.* at 978.

101. *Id.* at 984.

102. *Id.*

103. 901 N.E.2d 494 (Ind. 2009), *reh’g denied*, No. 71S05-0808-CR-446, 2009 LEXIS 619 (Ind. May 13, 2009).

104. *Id.* at 496, 504.

105. *Id.* at 505.

106. *Id.* (citing *Holmes v. South Carolina*, 547 U.S. 319, 327 & n.\* (2006)).

107. *Id.*

108. 895 N.E.2d 1201, 1205 (Ind. 2008), *cert. denied*, *Bassett v. Indiana*, 129 S. Ct. 1920 (2009).

109. *Id.* at 1210.



Rejecting Bassett's argument that the admission of this testimony violated Rule 403 in that its probative value was substantially outweighed by the danger of unfair prejudice, the court noted a long line of Indiana cases holding that "threats against potential witnesses as attempts to conceal or suppress evidence are admissible as bearing upon knowledge of guilt."<sup>110</sup>

In *McClain v. State*,<sup>111</sup> McClain appealed his conviction for Failure to Register as a Sex Offender claiming that the trial court abused its discretion when, despite his offer to stipulate to his status as a sexual offender, the trial court permitted the introduction of evidence regarding McClain's prior sexual battery conviction.<sup>112</sup> Finding the prejudicial impact of the details of McClain's sexual battery conviction indisputable in light of the fact the it had no probative value to the offense to which he had been tried, the court reversed McClain's conviction and remanded the case for a new trial.<sup>113</sup>

### C. Use of Related Extrinsic Evidence

Under Rule 404(b), evidence of a person's other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. However, it is admissible for other limited purposes, including demonstrating motive.<sup>114</sup> In *Camm v. State*,<sup>115</sup> a jury convicted David Camm of murdering his wife and children.<sup>116</sup> Part of the prosecution's theory of the case was that Camm had murdered his family to hide his molestation of his young daughter, Jill.<sup>117</sup> Although testimony established that Jill Camm had injuries to her groin that might have resulted from molestation, there was no direct evidence demonstrating that David Camm had molested her.<sup>118</sup>

In addressing whether the trial court's admission of the molestation evidence constituted reversible error, the Indiana Supreme Court noted that the State had failed to sufficiently connect Jill Camm's injuries to the defendant.<sup>119</sup> Under Rule 104(b), "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."<sup>120</sup> Thus, the court explained, the relevance of the alleged molestation as motive

---

110. *Id.* at 1211 (quoting *West v. State*, 755 N.E.2d 173, 182 (Ind. 2001)).

111. 898 N.E.2d 409 (Ind. Ct. App. 2008), *reh'g denied*, No. 02A03-0808-CR-428, 2009 Ind. App. LEXIS 866 (Ind. Ct. App. Apr. 24, 2009).

112. *Id.* at 410.

113. *Id.* at 411-12.

114. IND. R. EVID. 404(b).

115. 908 N.E.2d 215 (Ind. 2009), *reh'g denied*, No. 87500-0612-CR-499, 2009 Ind. LEXIS 1513 (Ind. Nov. 30, 2009).

116. *Id.* at 219-20.

117. *Id.* at 221.

118. *Id.* at 224.

119. *Id.* at 223.

120. *Id.* at 223-24. (quoting IND. R. EVID. 104(b)).

depended on evidence of two premises: (1) that Jill's groin injuries had resulted from molestation, and (2) that the defendant molested her.<sup>121</sup> Because there was no evidence supporting the second premise, the court found that the trial court's decision to allow "speculative evidence and argument that the defendant molested his daughter, combined with the State's use of this evidence as the foundation of its case" constituted reversible error.<sup>122</sup> The court added that even if the evidence had been admissible under Rules 404(b) and 104(b), Rule 403 would prevent its admission, as the "prejudicial impact" of the molestation allegation was "vividly evident."<sup>123</sup>

On another Rule 404 issue, the Indiana Supreme Court in *Camm* affirmed the trial court's exclusion of tendered evidence regarding alleged coconspirator Charles Boney's foot fetish and Boney's prior felony convictions for robberies targeting women's shoes.<sup>124</sup> *Camm* argued that such evidence established Boney's motive and identified Boney as the murderer. Finding Boney's previous crimes were not sufficiently similar to the murders of *Camm*'s family and that there was no evidence connecting the murders to a foot or shoe fetish, the Indiana Supreme Court held that Rule 404(b) barred admission of the tendered evidence.<sup>125</sup> The court explained that the inference suggested by the defense—that the court should infer Boney's guilt because of his fetish for shoes and feet—is precisely the type of inference forbidden by Rule 404.<sup>126</sup> The court also rejected *Camm*'s argument that the admission of the evidence was compelled by the Supreme Court's decision in *Holmes v. South Carolina*,<sup>127</sup> even if it was not admissible under the Indiana Rules of Evidence.<sup>128</sup>

In *Atteberry v. State*, the defendant claimed that the trial court erred when it permitted a witness for the prosecution to testify that the defendant's DNA was found in a DNA database.<sup>129</sup> Specifically, the defendant argued that, because the particular DNA database contained the DNA of convicted felons, any reference to it violated Rule 404(b) in that it informed the jury of his prior criminal acts.<sup>130</sup> The trial court did not allow the witness to testify as to the particular database but only that the defendant's DNA was in a national database.<sup>131</sup> The Indiana Court of Appeals, in declining to find that the trial court had erred, rejected the defendant's argument that the jury could have inferred that he had been convicted in the past by virtue of his DNA appearing in a national database.<sup>132</sup>

---

121. *Id.* at 224.

122. *Id.* at 225.

123. *Id.*

124. *Id.* at 230-31.

125. *Id.* at 231.

126. *Id.*

127. 547 U.S. 319 (2006).

128. *Id.* at 231-32 (citing *Holmes*, 547 U.S. at 323).

129. 911 N.E.2d 601, 608 (Ind. Ct. App. 2009).

130. *Id.*

131. *Id.* at 609.

132. *Id.*



*McClendon v. State*<sup>133</sup> presented the issue of whether Rules 403 and 404(b) prevented the admission of testimony concerning a confrontation between the defendant, Emanuel McClendon, and witness, "Christopher H."<sup>134</sup> The confrontation occurred approximately eleven months before McClendon fired shots at the home where Christopher H.'s wife and children lived, killing Christopher H.'s eight-year-old daughter, K.H.<sup>135</sup> McClendon claimed that he fired the shots in self-defense.<sup>136</sup> The State sought to introduce evidence of the earlier confrontation as proof of contrary intent.<sup>137</sup> In Christopher H.'s testimony about the earlier confrontation, he claimed that McClendon had accused him of watching McClendon bring "weed" into McClendon's residence. Initially the trial court denied the State's request, but eventually it reconsidered and allowed the evidence.<sup>138</sup>

On appeal, McClendon argued that the trial court should have excluded the evidence because "(1) the confrontation occurred eleven months before the shooting; and (2) Christopher H. mentioned 'weed' in his testimony, which could [have led] the jury to believe McClendon was involved in drug dealing."<sup>139</sup> The record showed that the trial court admitted the evidence because of its relation to the defendant's anticipated self-defense argument and because the probative value of the evidence outweighed its prejudicial effect.<sup>140</sup> The earlier confrontation related to an ongoing conflict between the men and the reference to "weed" provided context for the confrontation. On this record, the Indiana Court of Appeals found that the trial court had not abused its discretion by admitting the evidence.<sup>141</sup>

In *Bean v. State*, Joshua Bean was convicted of the murder and dismemberment of his former girlfriend, Heather Norris.<sup>142</sup> On appeal, Bean contended that the trial court, pursuant to Rule 404(b), should have excluded certain evidence, most of which concerned previous incidents of violence between Bean and Norris.<sup>143</sup> The evidence included an oral statement by Norris to a friend concerning a choking incident;<sup>144</sup> testimony that Bean had thrown Norris out of his car; and testimony regarding a confession to Norris's murder Bean made to a friend.<sup>145</sup> In each situation, however, the Indiana Court of

---

133. 910 N.E.2d 826 (Ind. Ct. App. 2009), *trans. denied*, No. 49A02-0811-CR-999, 2009 Ind. LEXIS 1340 (Ind. Oct. 1, 2009).

134. *Id.* at 833.

135. *Id.* at 829-30.

136. *Id.* at 830.

137. *Id.* at 832.

138. *Id.* at 831, 833.

139. *Id.*

140. *Id.* at 834.

141. *Id.*

142. 913 N.E.2d 243, 247-48 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 556 (Ind. 2009).

143. *Id.* at 251.

144. *Id.* at 252.

145. *Id.* at 254.

Appeals held that Bean waived the alleged error by failing to make a contemporaneous objection,<sup>146</sup> by failing to make an appropriate record of the objection,<sup>147</sup> or by failing to include citations to supporting authority.<sup>148</sup>

In *Roberts v. State*,<sup>149</sup> Roberts argued that the trial court abused its discretion when it allowed the State to introduce rebuttal evidence that he had choked three other women.<sup>150</sup> Noting that Roberts failed to object at trial, however, the Indiana Court of Appeals found the issue to be waived.<sup>151</sup> Moreover, waiver notwithstanding, the Indiana Court of Appeals held that the trial court properly admitted this evidence in accordance with Rule 404(b) because Roberts “opened the door” to such evidence via his own testimony on direct examination.<sup>152</sup>

Otherwise inadmissible evidence may become admissible where the defendant “opens the door” to questioning on that evidence.<sup>153</sup> During direct examination, Roberts testified that he had learned how to perform a chokehold during his martial arts training and that he had performed chokeholds approximately 100 times in the past.<sup>154</sup> He claimed, however, that he had only used the choke holds on men in a martial arts setting. The trial court did not abuse its discretion when it ruled that this direct testimony “opened the door” to the rebuttal evidence because the testimony left the jury with the false and misleading impression that Roberts had only performed chokeholds on other men in a martial arts setting.<sup>155</sup>

In *Whatley v. State*,<sup>156</sup> Whatley appealed his conviction for murder based, in part, on the State’s introduction of testimony that Whatley had been using drugs and had visited the Relax Inn to deliver drugs.<sup>157</sup> Whatley claimed the admission of this evidence constituted fundamental error<sup>158</sup> because it constituted evidence

---

146. *Id.* at 252.

147. *Id.* at 253.

148. *Id.* at 254 (citing IND. APP. R. 46(A)(8)(a)). Under IND. APP. R. 46(A)(8)(a), the argument section of an appellant’s brief “must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22.” IND. APP. R. 46(A)(8)(a).

149. 894 N.E.2d 1018 (Ind. Ct. App. 2008), *trans. denied*, No. 03A01-0804-CR-169, 2008 Ind. LEXIS 1381 (Ind. Dec. 18, 2008).

150. *Id.* at 1026.

151. *Id.* at 1027.

152. *Id.*

153. *Id.* at 1026-27 (citing *Jackson v. State*, 728 N.E.2d 147, 152 (Ind. 2000); *Schmidt v. State*, 816 N.E.2d 925, 946 (Ind. Ct. App. 2004) (“A party may ‘open the door’ to otherwise inadmissible evidence by presenting similar evidence that leaves the trier of fact with a false or misleading impression of the facts related.”)).

154. *Id.* at 1027.

155. *Id.*

156. 908 N.E.2d 276 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 549 (Ind. 2009).

157. *Id.* at 278.

158. Whatley’s counsel failed to object to the admission of this evidence at trial and as a result



of uncharged misconduct that should have been excluded under Rules 404(b) (evidence of other crimes, wrongs or acts) and 403.<sup>159</sup> The court noted that evidence of other bad acts should be excluded where the State offers it merely to produce the “forbidden inference” that the defendant engaged in the other bad acts and that “the charged conduct was in conformity with the uncharged misconduct.”<sup>160</sup> Here, however, the court found the State did not offer the evidence to show Whatley’s propensity to engage in crime or that he acted in conformity with a bad character trait.<sup>161</sup> Rather, the State offer the disputed evidence to assist the jury in understanding the relationship between Whatley and other witnesses and the context of the arguments and events that culminated in Whatley’s murder of Patel.<sup>162</sup> The evidence did not violate Rule 404(b) because it explained the relationship between the parties and the probative value of the relationship substantially outweighed the danger of prejudice.<sup>163</sup>

In *Hudson v. State*,<sup>164</sup> Hudson claimed that the trial court committed reversible error when it admitted evidence of his other acts of child molesting for which he was not charged.<sup>165</sup> The State charged Hudson with multiple offenses related to his sexual activities with his step-daughter and, asserting the evidence to be probative with regards to Hudson’s motive to commit the offenses charged, introduced the other uncharged acts.<sup>166</sup> Under Rule 404, “[e]vidence of uncharged misconduct which is probative of the defendant’s motive and which is ‘inextricably bound up’ with the charged crime is properly admitted under Rule 404.”<sup>167</sup> The victim’s testimony disputed the State’s claim that the uncharged conduct was inextricably bound up with the charged conduct. As a result the trial court abused its discretion when it admitted evidence of Hudson’s other uncharged acts.<sup>168</sup> The court found the error to be harmless but went on to affirm in part, and reverse in part, Hudson’s convictions, on grounds unrelated to the trial court’s Rule 404 error.<sup>169</sup>

---

he had no choice but to claim “fundamental error” as the basis of his appeal on this evidence. Normally, an appellate court only “review[s] the trial court’s ruling on the admission of evidence for an abuse of discretion.” *Id.* at 280 (citing *Noojin v. State*, 730 N.E.2d 672, 676 (Ind. 2000)). Failure to object at trial “normally results in waiver and precludes appellate review unless its admission constitutes fundamental error.” *Id.* at 280. (citing *Cutter v. State*, 725 N.E.2d 401, 406 (Ind. 2000)).

159. *Id.* at 280-81.

160. *Id.* at 281.

161. *Id.*

162. *Id.* at 282.

163. *Id.*

164. No. 82A04-0806-CR-355, 2009 Ind. App. LEXIS 363 (Ind. Ct. App. Mar. 6, 2009).

165. *Id.* at \*1.

166. *Id.* at \*13.

167. *Id.* (citing *Willingham v. State*, 794 N.E.2d 1110, 1116 (Ind. Ct. App. 2003)).

168. *Id.* at \*14.

169. *Id.* at \*16.

In *Rogers v. State*,<sup>170</sup> Rogers appealed his conviction of murder, in part, claiming that the trial court committed a Rule 404(b) error in the admission of evidence regarding his prior possession of a steak knife.<sup>171</sup> Rogers murdered his victim using a knife.<sup>172</sup> The State argued that simple possession of a knife is not evidence of a crime or wrong to which 404(b) applies. Relying upon the Indiana Supreme Court's decision in *Williams v. State*,<sup>173</sup> the court held the possession of a steak knife, like the possession of firearms, is not a "bad act" for Rule 404(b) purposes.<sup>174</sup>

In *Shepherd v. State*,<sup>175</sup> Shepherd, claiming that the trial court committed reversible error by admitting evidence that he made advances toward the victim and had taken a vehicle without permission the week before the murder, appealed his convictions for felony murder, rape, and burglary.<sup>176</sup> During his direct examination, Shepherd admitted to raping the victim and committing the burglary.<sup>177</sup> In light of these statements, the court declined to decide whether the evidence violated Rule 404(b), finding the admission of the evidence to be "clearly harmless beyond a reasonable doubt."<sup>178</sup>

In *Davis v. State*,<sup>179</sup> Davis contended that the trial court erred in admitting evidence that tended to indicate Davis had previously been involved in dog fighting—an offense similar to his convictions—thus violating Rule 404(b).<sup>180</sup> The State entered into evidence: (1) a handwritten paper titled, "April Show 2004," (2) a receipt for trophies dated October 24, 2003, (3) printouts dated 2002 from the Internet of information on dog fighting, (4) a blog printout dated 2003 discussing how other dog fighting rings had been "busted" by police, and (5) testimony regarding observations by neighbors of a gathering at Davis's home in February 2006.<sup>181</sup> Although the court found the Internet printouts and neighbors' testimony to be outside of Rule 404(b)'s scope of protection, the court found the handwritten paper and trophy receipt within the scope of Rule 404(b) because "they indicate past actions taken from which inferences could be drawn of Davis

---

170. 897 N.E.2d 955 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 987 (Ind. 2009).

171. *Id.* at 959-60.

172. *Id.* at 958-59.

173. 690 N.E.2d 162 (Ind. 1997).

174. *Rogers*, 897 N.E.2d at 960. The court went on to state that even assuming that Roger's possession of steak knife was Rule 404(b) evidence, he would not prevail because the error would have been considered harmless error and the evidence would be admissible for another purpose. "Evidence that the defendant had access to a weapon of the type used in the crime is relevant to a matter at issue other than the defendant's propensity to commit the charged act." *Id.* at 960-61 (citing *Pickens v. State*, 764 N.E.2d 295, 299 (Ind. Ct. App. 2002)).

175. 902 N.E.2d 360 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 991 (Ind. 2009).

176. *Id.* at 361-62.

177. *Id.* at 363.

178. *Id.* at 364.

179. 907 N.E.2d 1043 (Ind. Ct. App. 2009).

180. *Id.* at 1055.

181. *Id.* at 1055-56.



organizing dog fights.”<sup>182</sup> The court further found the prejudicial effect of the evidence outweighed its probative value and that the evidence was excludable pursuant to Rule 403. Regardless, the court found the admission of this evidence to be harmless error due to the “substantial independent evidence” of Davis’s guilt.<sup>183</sup>

In *Gallagher v. State*,<sup>184</sup> Gallagher challenged his conviction for dealing in a schedule II substance, in part on Rule 404(b) grounds, arguing that the trial court improperly admitted a digital recording of the drug buy both because the State violated a discovery order and the recording contained evidence of other bad acts on his part.<sup>185</sup> Although troubled by some of the State’s actions, the court found exclusion of the evidence improper as a discovery sanction because it saw no evidence that the State’s actions were deliberate.<sup>186</sup> As to his 404(b) argument, Gallagher claimed that the recording “painted him as a regular drug dealer who got high on cocaine and mistreated his own baby to get high.”<sup>187</sup> The court held that although the recording did contain evidence of other wrongdoing by Gallagher, it was properly introduced “to show Gallagher’s motive, intent, preparation, plan, knowledge, and absence of mistake,” especially in light of the limiting instruction give to ameliorate any Rule 403 concerns.<sup>188</sup>

In *Hape v. State*,<sup>189</sup> Hape challenged his conviction for felony possession of methamphetamine with the intent to deliver and felony resisting arrest on Rule 404(b) grounds.<sup>190</sup> He argued that a mistrial should have been granted “after the State elicited testimony indicating that he may have stolen the truck in which he fled from the arresting officers,” and that the police initially found Hape because of outstanding warrants.<sup>191</sup> The Indiana Court of Appeals found that Hape opened the door to testimony concerning the stolen truck when he testified about the ownership and possession of the truck.<sup>192</sup> Hape failed to raise the issue of warrants at trial and therefore waived that argument.<sup>193</sup> Moreover, the court held that even if Hape had raised a proper objection at trial, it would have lacked merit because defendant’s counsel advised the jury during opening statements that Hape was wanted by police because he “missed a court date.”<sup>194</sup>

---

182. *Id.* at 1056.

183. *Id.* at 1056.

184. 906 N.E.2d 272 (Ind. Ct. App.), *trans. granted*, 919 N.E.2d 552 (Ind. 2009), *superseded by* 922 N.E.2d 588 (Ind. 2010) (summarily affirming on 404(b) issue); *see* IND. APP. R. 58(A)(2).

185. *Gallagher*, 906 N.E.2d at 274-75.

186. *Id.* at 279.

187. *Id.*

188. *Id.*

189. 903 N.E.2d 977 (Ind. Ct. App.), *trans. denied*, 903 N.E.2d 944 (Ind. 2009).

190. *Id.* at 984-86.

191. *Id.* at 995.

192. *Id.* at 996.

193. *Id.* at 996-97.

194. *Id.* at 997.

#### *D. Knowledge Exception to Rule 404(b)*

In *Dean v. State*,<sup>195</sup> Dean appealed his conviction for two counts of dealing cocaine by asserting the trial court erred in admitting evidence of uncharged misconduct—that he confined and beat the State’s informant.<sup>196</sup> The court held that this admission of this evidence did not violate Rule 404(b) because it proved, or tended to prove, defendant’s “guilty knowledge or consciousness of guilt with respect to the charged crime.”<sup>197</sup> The court found that the evidence rested squarely within the “knowledge exception” listed in Rule 404(b)—evidence of other bad acts “may . . . be admissible for other purposes, such as proof of . . . knowledge.”<sup>198</sup>

#### *E. Reverse 404(b) Evidence*

In *Wells v. State*,<sup>199</sup> Wells appealed his conviction for felony involuntary manslaughter as a lesser-included offense of the charged crime of murder.<sup>200</sup> He claimed that the trial court erred when it excluded evidence regarding the prior sexual conduct of the victim. According to Wells, he and the victim were lovers and had a “wild lifestyle.”<sup>201</sup> In the offer of proof, Wells presented testimony of Christopher Sadler.<sup>202</sup> Sadler testified that he had worked for the victim, that the victim physically abused him, and that the victim forced him into sexual acts. Sadler further proffered that this abuse only stopped when he threatened the victim with a dagger.<sup>203</sup> The trial court applied Rule 404(b) to exclude this evidence of the prior conduct of the victim, not the defendant, citing the Indiana Supreme Court’s decision in *Garland v. State*.<sup>204</sup> In order to be admissible, evidence about the bad acts of a non-defendant must fall into one of the Rule 404(b) exceptions.<sup>205</sup> Wells asserted that the evidence fell into two of the exceptions to Rule 404(b). First, Wells asserted that the proffered evidence fell into the exception to prove the victim’s motive and intent to instigate the fight that led to his death—Wells wanted to show that the victim’s conduct toward Sadler was the same or similar as the victim’s conduct toward Wells.<sup>206</sup> The court held that “[t]his is exactly what . . . Rule 404(b) was designed to prevent, i.e. using proof of someone’s crimes, wrongs, or acts to prove the character of a

---

195. 901 N.E.2d 648 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 988 (Ind. 2009).

196. *Id.* at 651.

197. *Id.* at 652 (quoting *Larry v. State*, 716 N.E.2d 79, 81 (Ind. Ct. App. 1999)).

198. *Id.* (quoting IND. R. EVID. 404(b)).

199. 904 N.E.2d 265 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 994 (Ind. 2009).

200. *Id.* at 268.

201. *Id.*

202. *Id.* at 269.

203. *Id.*

204. 788 N.E.2d 425 (Ind. 2003).

205. *Wells*, 904 N.E.2d at 270.

206. *Id.*



person in order to show action in conformity therewith.”<sup>207</sup>

Next, Wells also claimed that Sadler’s testimony should have been admitted to show the victim’s *modus operandi*.<sup>208</sup> “The identity exception to [Rule 404(b)] is crafted primarily for ‘signature’ crimes with a common *modus operandi*. The exception’s rationale is that the crimes, or means used to commit them, were so . . . unique that it is highly probable that the same person committed all of them.”<sup>209</sup> Finding that the victim’s prior conduct and the conduct in question were not “strikingly similar,” the court held the trial court did not err when it held this exception to Rule 404(b) likewise did not apply.<sup>210</sup>

### F. Rape Shield Issues

In *Oatts v. State*,<sup>211</sup> Oatts appealed his conviction for child molesting asserting that the trial court erred when it excluded evidence that the victim had previously viewed an allegedly pornographic video and had previously been molested.<sup>212</sup> Rule 412(a) governs the admissibility of past sexual conduct and provides in relevant parts: “In a prosecution of a sex crime, evidence of the past sexual conduct of a victim . . . may not be admitted, except” under certain circumstances.<sup>213</sup> Oatts failed to file a formal offer of proof with regards to this evidence at least ten (10) days before trial pursuant to Rule 412(b).<sup>214</sup> The court, acknowledging the existing split of opinions of prior Indiana Court of Appeals panels on this issue,<sup>215</sup> declined to address the apparent conflict, holding that, even assuming that Oatts did not waive the issue, the trial court did not abuse its discretion in excluding the past sexual conduct evidence.<sup>216</sup>

Indiana’s Rape Shield Rule—Rule 412—“incorporates the basic principles”

---

207. *Id.*

208. *Id.*

209. *Id.* (quoting *Thompson v. State*, 690 N.E.2d 224, 234 (Ind. 1997)).

210. *Id.*

211. 899 N.E.2d 714 (Ind. Ct. App. 2009).

212. *Id.* at 716.

213. IND. R. EVID. 412(a).

214. *Oatts*, 899 N.E.2d at 716.

215. *Id.* at 719 n.6 (comparing *Sallee v. State*, 785 N.E.2d 645, 651 (Ind. Ct. App.) (“holding that the defendant’s failure to comply with [Rule 412(b)] precluded her from presenting evidence of the victim’s past sexual history and resulted in waiver of the issue on appeal”), *trans. denied*, 792 N.E.2d 46 (Ind.), *cert. denied*, *Sallee v. Indiana*, 540 U.S. 990 (2003), and *Graham v. State*, 736 N.E.2d 822, 826 (Ind. Ct. App. 2000) (“holding that defendant’s failure to comply with the procedural mandate of [Rule 412(b)] was fatal to his attempt to introduce evidence of prior false rape allegations”), with *Sallee v. State*, 777 N.E.2d 1204, 1210 n.6 (Ind. Ct. App. 2002) (“rejecting the State’s argument that the defendant had waived any claim of error by failing to comply with the procedural requirements of [Rule 412] and holding that ‘the requirement that the proponent of the evidence file a written motion ten days prior to trial applies only if the evidence sought to be introduced fits within one of the exceptions to the general rule’”)).

216. *Id.* at 721.

of Indiana's Rape Shield Act.<sup>217</sup> In addition the exceptions enumerated in Rule 412(a), "a common-law exception has survived the 1994 adoption of the [Rules]."<sup>218</sup> The common-law exception provides that "evidence of a prior accusation of rape is admissible if: (1) the victim has admitted that his or her prior accusation of rape is false; or (2) the victim's prior accusation is demonstrably false."<sup>219</sup> The evidence that the victim viewed an allegedly pornographic video and had been previously molested did not fall into any of the Rule 412(a) or the common-law exceptions to Indiana's Rape Shield Rule. Citing a long line of Supreme Court decisions holding that a trial court did not err in excluding evidence of a similar nature, the court of appeals held that the trial court did not abuse its discretion by excluding the evidence.<sup>220</sup>

In *Maldonado v. State*<sup>221</sup> the defendant, who was convicted of felony child molesting, argued that he had received ineffective assistance of counsel because his attorney did not attempt to introduce evidence of the victim's alleged statements about a sexual encounter with an imaginary brother.<sup>222</sup> Maldonado asserted that Indiana's Rape Shield Rule would not have barred the evidence.<sup>223</sup>

In rejecting Maldonado's argument, the Indiana Court of Appeals explained that Indiana has both a Rape Shield Rule and a Rape Shield Statute;<sup>224</sup> where the statute and rule differ, the statute yields to the rule.<sup>225</sup> The court also noted the existence of an additional common law exception to the rape Shield Rule that allows a defendant to introduce evidence of a victim or witness's prior false

---

217. *State v. Walton*, 715 N.E.2d 824, 826 (Ind. 1999) (confirming Rule 412's incorporation of the principles of Indiana's Rape Shield Act in IND. CODE § 35-37-4-4 (2008)).

218. *Oatts*, 899 N.E.2d at 720 (citing *Walton*, 715 N.E.2d at 826-28).

219. *Id.* at 721 (citing *Walton*, 715 N.E.2d at 826-28).

220. *Id.* The court cited the following cases and included the quoted parentheticals: *Tague v. State*, 539 N.E.2d 480, 482 (Ind. 1989) ("holding that the trial court did not err in excluding the evidence of possible molestation of the victim by a person other than the defendant and '[v]irginity or the lack thereof has absolutely nothing to do with the crime of child molestation'"); *Beckham v. State*, 531 N.E.2d 475, 477 (Ind. 1988) ("addressing a situation in which the defendant offered to prove the fact that the seven-year-old victim reportedly told his mother that he had previously been molested by another person and the similarity between the physical acts in the two instances and holding that the trial court properly excluded evidence of a prior molestation committed by a different person"); *Baughman v. State*, 528 N.E.2d 78, 79 (Ind. 1988) ("holding that evidence of prior molestation by a different person was the type of evidence which the legislature deemed should be excluded"); *Parrish v. State*, 515 N.E.2d 516, 519-20 (Ind. 1987) ("holding that the trial court properly refused to permit the defendant to question the nine-year-old victim as to whether he had been sexually abused in the past because Indiana's Rape Shield Statute shields the victim of a sex crime from a general inquiry into the history of past sexual conduct").

221. 908 N.E.2d 632, 633 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 552 (Ind. 2009).

222. *Id.* at 633-34.

223. *Id.*

224. IND. CODE § 35-37-4-4 (2008).

225. *Maldonado*, 908 N.E.2d at 637 (citing *Fugett v. State*, 812 N.E.2d 846, 848-49 (Ind. Ct. App. 2004)).



accusation of rape or sexual misconduct.<sup>226</sup> Because the evidence did not concern any actual sexual conduct—any statement by the victim concerning a sexual relationship with an imaginary brother was demonstrably false—the evidence was admissible either under the Rape Shield Rule’s exceptions or under the common law exception.<sup>227</sup> The court explained that the evidence “would have been used to question the veracity of [the victim’s] allegations against Maldonado and impeach her parents’ testimony that she had never made up stories of a sexual nature in the past.”<sup>228</sup>

#### *G. Statement Written as Part of the Plea Negotiation Process*

In *Gonzalez v. State*, the State charged Gonzalez with several crimes after he ran a stop sign and hit a school bus.<sup>229</sup> As part of his attempt to negotiate a plea, Gonzalez wrote a letter to the school corporation apologizing for the incident and admitting that he had been drinking beforehand.<sup>230</sup> The trial court allowed the State to admit the letter as substantive evidence of Gonzalez’s guilt.<sup>231</sup> On appeal, the court held that the letter constituted a privileged communication made in connection with the plea negotiation process that the trial court should not have admitted under Rule 410.<sup>232</sup> Moreover, because the letter amounted to a confession, the decision to admit it was not harmless error, and Gonzalez’s conviction warranted reversal.<sup>233</sup>

### IV. WITNESSES (RULES 601 – 613)

#### *A. Requirement of Oath of Affirmation*

In *Griffith v. State*,<sup>234</sup> Valentino Griffith asserted that the trial court erred when it permitted a witness (Griffith’s neighbor and the victim of criminal acts) to testify without having first been sworn to tell the truth.<sup>235</sup> Griffith appeared to argue that the victim’s testimony lacked probative value because she failed to “swear or affirm that she would tell the truth.”<sup>236</sup> Prior to testifying, the victim responded “[s]o” when the trial court asked the question: “do you solemnly swear, or affirm, under penalty of perjury, that the testimony that you are about

---

226. *Id.* (citing *Fugett*, 812 N.E.2d at 848-49).

227. *Id.*

228. *Id.* at 638.

229. 908 N.E.2d 313, 315 (Ind. Ct. App.), *trans. granted, opinion vacated*, 919 N.E.2d 552 (Ind. 2009).

230. *Id.*

231. *Id.*

232. *Id.* at 315-16.

233. *Id.* at 319.

234. 898 N.E.2d 412 (Ind. Ct. App. 2008).

235. *Id.* at 413.

236. *Id.*

to give is the truth, the whole truth, and nothing but the truth?"<sup>237</sup> Griffith failed to object to the victim's response, and the prosecutor proceeded with the examination.<sup>238</sup> Rule 603 governs the oath or affirmation requirement to be satisfied before a witness testifies.

Rule 603 provides:

Before testifying, every witness shall swear or affirm to testify to the truth, the whole truth, and nothing but the truth. The mode of administering an oath or affirmation shall be such as is most consistent with, and binding upon the conscience of the person to whom the oath is administered.<sup>239</sup>

This rule "embodies a pre-existing Indiana statute," Indiana Code section 34-45-1-2.<sup>240</sup> Indiana Code section 34-45-1-2 provides: "Before testifying, every witness shall be sworn to testify the truth, the whole truth, and nothing but the truth. The mode of administering an oath must be the most consistent with and binding upon the conscience of the person to whom the oath may be administered."<sup>241</sup> Indiana's trial courts have consistently held that failure to object at trial to a witness's failure to adhere to the statutory requirement that testimony be given under oath or affirmation may be waived by failing to objection.<sup>242</sup> Griffith failed to object to his victim's testimony at trial; therefore, the court ruled that Griffith waived this issue and the trial court properly considered the testimony.<sup>243</sup>

### *B. Inquiry as to Validity of Verdict*

Under Rule 606(b), a juror may testify to the validity of a verdict to determine whether any outside influence improperly influenced a member of the jury.<sup>244</sup>

The case of *Hape v. State*,<sup>245</sup> raised an interesting issue in the modern

---

237. *Id.*

238. *Id.*

239. IND. R. EVID. 603.

240. *Griffith*, 898 N.E.2d at 412 (quoting MILLER, *supra* note 4, § 603.101, at 70 (2007)).

241. IND. CODE § 34-45-1-2 (2008).

242. *Griffith*, 898 N.E.2d at 412 (citing *Sweet v. State*, 498 N.E.2d 924, 926 (Ind. 1986) ("holding that the statutory requirement under [Indiana section] 34-1-14-2 that every witness be sworn to testify the truth, the whole truth, and nothing but the truth can be waived by the parties if no objection is made and holding that appellate review was foreclosed because there was no objection"), *superseded on other grounds by* IND. EVID. R. 404; *Pooley v. State*, 62 N.E.2d 484, 485 (Ind. Ct. App. 1945) (holding that the statutory requirement that every witness shall be sworn can be waived by the parties and if no objection is made to a witness testifying without being so sworn such waiver will be presumed)).

243. *Id.* at 415-16.

244. IND. R. EVID. 606(b).

245. 903 N.E.2d 977 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 994 (Ind. 2009).



electronic age. The State introduced Hape's cellular telephones into evidence at trial as part of an exhibit showing the items confiscated from Hape at the time of his arrest.<sup>246</sup> Unbeknownst to Hape or the State, the telephones contained text messages that the jury read during its deliberations.<sup>247</sup> On appeal, Hape raised multiple issues, a number of which pertained to the accidental exposure of the text messages to the jury.<sup>248</sup> The Indiana Court of Appeals ultimately found text messages to be intrinsic to the cellular telephones in which they were stored.<sup>249</sup> Therefore, pursuant to Rule 606(b) Hape could not use the text messages to impeach the jury's verdict.<sup>250</sup>

### C. Mode and Order of Testimony

In *Franciose v. Jones*,<sup>251</sup> Mark Franciose and Ray Ramirez raised a number of issues on appeal, one of which asserted that the trial court abused its discretion by refusing to strike the testimony from Aaron Jones's expert—Dr. Yarkony—which preemptively rebutted the anticipated testimony of an expert witness for Franciose—Dr. Owens.<sup>252</sup> Dr. Yarkony testified about Jones's future need for medical treatment and the attendant costs stemming from said treatment.<sup>253</sup> The trial court permitted Dr. Yarkony to testify before Dr. Owens, in accordance with Rule 611(a), and merely conditionally admitted Dr. Yarkony's testimony, subject to the content of Dr. Owen's subsequent testimony, in accordance with Rule 104(b).<sup>254</sup> Dr. Owen testified during Franciose's

---

246. *Id.* at 984.

247. *Id.*

248. *Id.* at 986.

249. *Id.* at 987-88.

250. *Id.* The court quickly dispensed with Hape's authentication objections to the text messages under Rules 901(a) and 1002. *Id.* at 989-90. The State established a clear chain of custody with regards to the phones, and by extension, the text messages. *Id.* at 990. The court found the text messages themselves requiring authentication under Rule 901(a); however, it found the States failure to present such authentication evidence harmless error. *Id.* at 990-91 (citing *Bone v. State*, 771 N.E.2d 710, 716 (Ind. Ct. App. 2002) (discussing the authentication of files containing child pornography on a computer)).

251. 907 N.E.2d 139 (Ind. Ct. App. 2009), *aff'd on reh'g*, 2009 Ind. App. Unpub. LEXIS 1444 (Ind. Ct. App. July 29, 2009), *aff'd* 910 N.E.2d 862 (Ind. Ct. App. 2009), *trans. denied*, 919 N.E.2d 558 (Ind. 2009).

252. *Id.* at 143-44.

253. *Id.* at 144.

254. *Id.* at 144-45. Franciose made an oral motion to strike Dr. Yarkony's testimony after the close of his testimony, "arguing that Dr. Yarkony, as a rebuttal witness, should have testified after Dr. Owens." *Id.* at 144. The trial court denied the motion. Franciose reiterated his argument on this point before Dr. Owens testified, to which the trial court responded that its ultimate ruling on the admissibility of Dr. Yarkony's testimony "would depend on what [Dr. Owens] testifies to and whether it's what Dr. Yarkony actually said as rebuttal" testimony during Jones's case-in-chief. *Id.* at 145.

presentation of evidence about the chance of Jones's future need for surgery. The court found that the trial court did not abuse its discretion when it held that Franciose "opened the door" to rebuttal evidence on this topic from Dr. Yarkony.<sup>255</sup> The court furthered reaffirmed a trial court's discretion to control the order of witnesses and flow of testimony at trial pursuant to Rule 611(a).<sup>256</sup>

#### *D. Jury Questions of Witnesses*

In *Amos v. State*,<sup>257</sup> Amos argued that the trial court abused its discretion when it permitted two jury questions to be asked of a witness to clarify his testimony.<sup>258</sup> Rule 614(d) governs juror questions and provides:

A juror may be permitted to propound questions to a witness by submitting them in writing to the judge, who will decide whether to submit the questions to the witness for answer, subject to the objections of the parties, which may be made at the time or at the next available opportunity when the jury is not present. Once the court has ruled upon the appropriateness of the written questions, it must then rule upon the objections, if any, of the parties prior to submission of the questions to the witness.<sup>259</sup>

A proper juror question "allows the jury to understand the facts and discover the truth."<sup>260</sup> Determining whether a litigant offers a question "for a proper purpose necessarily requires an examination of the substance of the question."<sup>261</sup> Amos contended that "the questions were not proper because they allowed the jury to inquire about issues, which had come out on direct examination, but which Amos had chosen not to pursue on cross-examination."<sup>262</sup> Thus, he claimed "that the questions allowed inquiry beyond the scope of his cross-examination and went beyond clarification."<sup>263</sup> The Indiana Court of Appeals held that Rule 614 does not confine jury questions to the scope of cross-examination and may be proper if helpful in clarifying testimony on direct examination.<sup>264</sup>

#### *E. Scope of Cross Examination*

In *Stokes v. State*, defendant Jay Stokes appealed his conviction for, among

---

255. *Id.*

256. *Id.*

257. 896 N.E.2d 1163 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 979 (Ind. 2009).

258. *Id.* at 1170.

259. IND. R. EVID. 614(d).

260. *Amos*, 896 N.E.2d at 1170 (citing *Trotter v. State*, 733 N.E.2d 527, 530 (Ind. Ct. App. 2000)).

261. *Id.* (quoting *Trotter*, 733 N.E.2d at 530).

262. *Id.*

263. *Id.*

264. *Id.* at 1170.



other things, attempted armed robbery and being a habitual offender.<sup>265</sup> Stokes claimed that the trial court erred when it allowed a number of “comments” relating to his criminal history, including various testimony and a question by the State.<sup>266</sup> Stokes himself testified that “he had been in trouble with the law on two prior occasions, one of which involved a robbery.”<sup>267</sup> Consequently, the Indiana Court of Appeals noted that Stokes “opened the door” to the State’s cross-examination regarding his criminal history.<sup>268</sup> The court further explained that Rule 611(b) limits the scope of cross-examination “to the subject matter of the direct exam and matters affecting the credibility of the witness.”<sup>269</sup> Likewise, the court explained, “when a defendant injects an issue into the trial, he opens the door to otherwise admissible evidence.”<sup>270</sup> Because Stokes opened the door to the otherwise inadmissible testimony, the trial court had not erred in admitting it.<sup>271</sup>

## V. OPINIONS AND EXPERT TESTIMONY (RULES 701-705)

### A. *Reliable of Scientific Principles Underlying Opinion*

In *Camm v. State*, the defendant, who stood accused of murdering his wife and children, challenged expert testimony offered by the State to show that bloodstains on the defendant’s clothing resulted from high-velocity impact spatter, as opposed to mere contact with the victims’ bodies.<sup>272</sup> Under Rule 702(b), expert scientific testimony is admissible where the court is satisfied that the scientific principles underlying the testimony are reliable.

Here, the defendant did not challenge the general admissibility of expert opinion on bloodstain analysis.<sup>273</sup> Instead, he argued that bloodstain analysis was not proper under the circumstances because the stains on his clothing were few and small. The Indiana Supreme Court rejected this argument, noting that in addition to the State’s five experts, the defendant called four of his own expert witnesses to testify on the issue, and that each of the defendant’s experts believed themselves capable of rendering an opinion on the source of the bloodstains.<sup>274</sup> Moreover, the defendant failed to provide any authority demonstrating that bloodstain analysis was unreliable under the circumstances.<sup>275</sup> The court

---

265. 908 N.E.2d 295, 299 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 559 (Ind. 2009).

266. *Id.* at 301.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* at 302 (citing *Tadwul v. State*, 720 N.E.2d 1211, 1217 (Ind. Ct. App. 1999)).

271. *Id.*

272. 908 N.E.2d 215, 234 (Ind. 2009), No. 87S00-0612-CR-499, 2009 Ind. LEXIS 1513 (Ind. Nov. 30, 2009).

273. *Id.*

274. *Id.* at 234-35.

275. *Id.*

similarly rejected Camm's arguments concerning a courtroom demonstration involving the bloodstain evidence.<sup>276</sup>

### *B. Opinion Testimony by Lay Witness*

In *Ashworth v. State*,<sup>277</sup> Ashworth appealed his conviction and sentence for murder, challenging the trial court's admission of opinion evidence from a lay witness—the investigating detective—about the elimination of two persons as suspects.<sup>278</sup> The trial court permitted Detective Rogers's opinion testimony (based upon his investigation and the investigation of others) regarding the elimination of the two persons as suspects. Ashworth, invoking Rule 701, argued that the trial court abused its discretion in allowing this lay opinion fraught with hearsay.<sup>279</sup> Rule 701 limits lay opinion testimony such as Rogers's to opinions that are: “(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.”<sup>280</sup> Relying on federal precedent due the lack of Indiana case law on point, the court held the opinion testimony inadmissible under Rule 701.<sup>281</sup>

### *C. Rule 702(b) Challenge in the Midst of Trial—A Cautionary Tale*

In *Cox v. Matthews*,<sup>282</sup> the defendants appealed the trial court's judgment holding them liable to Matthews for \$4,126,529 in damages. The defendants claimed that the trial court committed reversible error when it allowed the expert testimony of Anthony M. Gamboa, Ph.D., a vocational economic analyst.<sup>283</sup> The defendants specifically attacked Dr. Gamboa's testimony regarding Matthews's decreased work life, asserting that because said testimony “did not relate to the specific case and lacked a foundation,” making it unreliable under Rule 702(b).<sup>284</sup> The defendants failed to specifically object to Dr. Gamboa's testimony under Rule 702(b) and, as a result, the court found the issue to be waived on appeal.<sup>285</sup> Waiver notwithstanding, the court went on to say that even if the issue had not been waived, the trial court nonetheless properly admitted the evidence under Rule 702(b), which provides, “[e]xpert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert

---

276. *Id.* at 235-36.

277. 901 N.E.2d 567 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 987 (Ind. 2009).

278. *Id.* at 569.

279. *Id.* at 571-72.

280. *Id.* at 572.

281. *Id.* (citing *United States v. Garcia*, 413 F.3d 201, 209-10 (2d Cir. 2005) (holding that the trial court improperly permitted a DEA agent to provide a lay opinion laden with “information gathered by various persons in the course of an investigation”).

282. 901 N.E.2d 14 (Ind. Ct. App. 2009), *reh'g denied*, No. 45A05-0803-CV-183, 2009 Ind. App. LEXIS 752 (Ind. Ct. App. Apr. 7, 2009), *trans. denied.*, 915 N.E.2d 995 (Ind. 2009).

283. *Id.* at 16.

284. *Id.* at 21.

285. *Id.* at 22.



testimony rests are reliable.”<sup>286</sup> Finding the scientific principles upon which Dr. Gamboa’s testimony rested reliable, the court found Dr. Gamboa’s testimony admissible.<sup>287</sup>

In *Franciose v. Jones*,<sup>288</sup> the court again visited the issue of Dr. Gamboa being permitted to testify at a trial regarding a plaintiff’s diminishing future earning capacity.<sup>289</sup> Franciose argued that “the trial court committed reversible error by permitting Dr. Gamboa to testify because his testimony lacked sufficient reliability to be admissible.”<sup>290</sup>

The parties agreed that Dr. Gamboa was an expert witness but ultimately disagreed on whether his testimony constituted scientific testimony.<sup>291</sup> During trial, before testifying to his opinions regarding Jones’s diminished future earning capacity, Dr. Gamboa explained his area of expertise as follows: “What I do is define what effect a disability has on a person’s capacity to work and earn money. I function like an appraiser, except I’m appraising human beings who have become disabled in defining what loss of earning capacity is probably as a result of a disability.”<sup>292</sup> Indiana’s courts had previously held that Dr. Gamboa’s testimony about his analysis and conclusions constituted scientific testimony and the court saw no reason to readdress this issue.<sup>293</sup> The basis upon which a party may object to scientific testimony by an expert witness is Rule 702(b), which provides: “Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.”<sup>294</sup> The Indiana Supreme Court’s seminal case, *Steward v. State*,<sup>295</sup> discussed the application of Rule 702(b) to expert testimony in Indiana’s trial courts:

The concerns driving *Daubert* [*v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), interpreting Federal Rule of Evidence 702] coincide with the express requirement of Indiana Rule of Evidence 702(b) that the trial court be satisfied of the reliability of the scientific principles involved. Thus, although not

---

286. *Id.* (quoting IND. R. EVID. 702(b)).

287. *Id.*

288. 907 N.E.2d 139 (Ind. Ct. App. 2009), *aff’d on reh’g*, 2009 Ind. App. Unpub. LEXIS 1444 (Ind. Ct. App. July 29, 2009), *aff’d* 910 N.E.2d 862 (Ind. Ct. App. 2009), *trans. denied*, 919 N.E.2d 558 (Ind. 2009).

289. *Id.* at 145.

290. *Id.*

291. *Id.* at 145-46.

292. *Id.*

293. *Id.* at 146 (citing *Cox v. Matthews*, 901 N.E.2d 14, 22 (Ind. Ct. App. 2009) (“examining Dr. Gamboa’s testimony under Indiana Evidence Rule 702(b)”); *Kempf Contracting & Design, Inc. v. Holland-Tucker*, 892 N.E.2d 672, 677-78 (Ind. Ct. App. 2008) (“discussing admissibility of testimony from a vocational economist pursuant to Indiana Evidence Rule 702(b)”).

294. *Id.*

295. 652 N.E.2d 490, 498 (Ind. 1995).

binding upon the determination of state evidentiary law issues, the federal evidence law of *Daubert* and its progeny is helpful to the bench and bar in applying Indiana Rule of Evidence 702(b).<sup>296</sup>

Under Rule 702(b), there exists no “specific ‘test’ or set of ‘prongs’ which must be considered” by a trial court.<sup>297</sup> Instead, a *Steward* analysis involves inquiring into factors identified in the *Daubert* decision “and any other considerations that assist the trial court in determining whether ‘the scientific principles upon which the expert testimony rests are reliable.’”<sup>298</sup>

Franciose “failed to sufficiently alert the trial court that he objected to Dr. Gamboa’s testimony.”<sup>299</sup> In the objection that he did voice, Franciose additionally failed to discuss the list of *Daubert* factors or any other factors in an attempt to challenge the reliability of the scientific principles upon which Dr. Gamboa rested his testimony.<sup>300</sup> The court noted:

Franciose’s objection could have appeared to the court and the other parties to be an objection to the data used by Dr. Gamboa rather than his scientific methodology. If Franciose desired a ruling on the reliability of Dr. Gamboa’s scientific methodology, it was his responsibility to make that clear to the court.<sup>301</sup>

The court ultimately found that Franciose failed to “sufficiently alert the trial court” that he sought a ruling under Rule 702(b) and as a result the trial court did not abuse its discretion in allowing Dr. Gamboa’s testimony.<sup>302</sup> As its parting point, the court issued a practice tip on the Rule 702(b) issue in this case: “[It would be] wise for a party to inform the trial court before trial that it wishes to raise an objection to the reliability of the expert witness’s scientific methodology.”<sup>303</sup>

#### D. “Skilled Witness” Testimony

A witness may be qualified as a “skilled witness” under Rule 701,<sup>304</sup> which states that “[a] skilled witness is a person with ‘a degree of knowledge short of that sufficient to be declared an expert under [Rule 702], but somewhat beyond

---

296. *Id.* at 498.

297. *Franciose*, 907 N.E.2d at 146 (quoting *McGrew v. State*, 682 N.E.2d 1289, 1292 (Ind. 1997)).

298. *Id.* at 146-47 (quoting from Rule 702(b)).

299. *Id.* at 147.

300. *Id.*

301. *Id.*

302. *Id.* at 147-48.

303. *Id.* at 148 (“Where a party waits until trial to raise a challenge requiring a *Steward* analysis, that party places a significant burden upon the trial court by asking the court to halt its proceedings and engage in what will possibly be a very lengthy hearing separate from the trial, often while an impaneled jury sits idle”).

304. *Kubsch v. State*, 784 N.E.2d 905, 922 (Ind. 2003).



that possessed by the ordinary jurors.”<sup>305</sup> Pursuant to Rule 701, a skilled witness may provide an opinion or inference that is “(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue.”<sup>306</sup> In *Hape v. State*,<sup>307</sup> the court addressed whether the trial court properly found that the State established Trooper Gadberry’s heightened degree of knowledge about methamphetamine, and by extension that he could testify about the amount of meth held by a typical user versus a typical dealer and other information related to the processing, packaging, pricing and sale of meth pursuant to Rule 701.<sup>308</sup> Under the facts in this case, the court found it to be error, albeit harmless error, for Gadberry to testify regarding “how much methamphetamine it takes for a person to get high,” because such testimony required scientific knowledge as required under Rule 702.<sup>309</sup> The court went on to hold that the trial court properly admitted as a “skill witness” Gadberry’s testimony regarding “dose and dealing amounts” and “the relationship between quantity [of meth] and personal use” under Rule 701.<sup>310</sup>

#### *E. Post-Conviction Relief Expert Testimony*

In *Whedon v. State*,<sup>311</sup> Whedon contended that the post-conviction court erred when it excluded the expert testimony of her proffered witness—Rob Warden, Executive Director of the Center on Wrongful Convictions at Northwestern University School of Law—pursuant to Rules 702 and 704.<sup>312</sup> Whedon sought to introduce Warden’s testimony about incentivized witnesses and wrongful convictions at her post-conviction hearing.<sup>313</sup> Warden conducted studies on wrongful convictions involving incentivized witnesses, i.e., “snitches.”<sup>314</sup> Whedon asserted that Warden’s testimony was “relevant to her allegation of newly discovered evidence” (which the court of appeals held that the post-conviction court had properly excluded) that the inmate witnesses against her concocted testimony, asserting that Whedon made incriminating statements, “in hopes of receiving favorable treatment from the State on their own sentences.”<sup>315</sup> The issue of the admissibility of Warden’s testimony was not available for collateral review because the claim that the testimony of the two jailhouse witnesses had not been truthful did not constitute “newly discovered evidence.” Warden’s testimony was therefore properly excluded on those grounds and it was

---

305. *Id.* (quoting MILLER, *supra* note 4, § 701.105, at 31 (2008)).

306. *Id.*

307. 903 N.E.2d 977 (Ind. Ct. App.), *trans. denied*, 903 N.E.2d 977 (Ind. 2009).

308. *Id.* at 992.

309. *Id.* at 993.

310. *Id.*

311. 900 N.E.2d 498 (Ind. Ct. App.), *aff’d*, 905 N.E.2d 408 (Ind. 2009).

312. *Id.* at 505.

313. *Id.* at 500, 505.

314. *Id.* at 505.

315. *Id.*

not necessary to address the issue of its general admissibility.<sup>316</sup>

#### *F. Opinions as to Legal Conclusions*

In *Pelley v. State*, the state waited thirteen years after the crime occurred to charge the defendant Jeff Pelley with murder.<sup>317</sup> Pelley sought to question Jack Krisor, a deputy prosecuting attorney who was present at one of Pelley's police interviews not long after the crime was committed, about his opinion at the time of the interview that there was not enough evidence to charge Pelley.<sup>318</sup> The Supreme Court found that the trial court had properly excluded the evidence of Krisor's opinion as inadmissible under Rule 704(b). The Indiana Supreme Court explained that Rule 704(b) prohibits a witness in a criminal case from testifying to opinions concerning intent, guilt, innocence, or legal conclusions. Krisor's opinion regarding the sufficiency of the evidence against Pelley qualified as inadmissible because it constituted an opinion of a legal conclusion and was also protected by the work-product privilege.<sup>319</sup>

#### *G. Use of Hearsay by Qualified Experts in Forming Opinion*

In *Pendergrass v. State*,<sup>320</sup> the Indiana Supreme Court explored the intersection of Rule 703 and Rule 803.<sup>321</sup> The State accused defendant Pendergrass of molesting his daughter, C.D.<sup>322</sup> At age thirteen, C.D. became pregnant and had an abortion. Police collected DNA evidence from the fetus and the defendant. Dr. Michael Conneally performed a paternity analysis and determined that Pendergrass was the father of C.D.'s aborted fetus. During Conneally's testimony at trial, the State presented documents prepared by Conneally and the Indiana State Police Laboratory. Pendergrass objected to the admission of the evidence on hearsay and Confrontation Clause grounds, arguing that the State was required to call the laboratory analyst who performed the tests on which Conneally and the documents relied.<sup>323</sup>

The Supreme Court explained that under Rule 703 qualified experts may properly rely on information supplied by third parties, where the qualified expert determines such information to be material, even if the party that supplied the information is not available to testify in court.<sup>324</sup> Thus, although the trial court could have chosen to subject the sources on which Conneally relied to a limiting

---

316. *Id.* at 506.

317. 901 N.E.2d 494, 506 (Ind. 2009), *reh'g denied*, No. 71S05-0808-CR-446, 2009 Ind. LEXIS 619 (Ind. May 13, 2009).

318. *Id.*

319. *Id.*

320. 913 N.E.2d 703, 704 (Ind. 2009).

321. *Id.* at 708-09.

322. *Id.* at 704.

323. *Id.*

324. *Id.* at 708-09.



instruction, it did not err in admitting them.<sup>325</sup>

#### *H. Testimony Regarding Analysis Performed by Another Analyst*

In *Farmer v. State*, an expert witness for the State, Scott Owens, testified to a laboratory analysis performed by another analyst, Kathy Boone.<sup>326</sup> On appeal, the defendant argued that the trial court erred in allowing this testimony. The record, however, demonstrated that Owens testified about Boone's analysis "at length" before the defense conducted a voir dire of Owens to determine whether he had personally performed the analysis.<sup>327</sup> Even after the voir dire, the defense did not object to Owens' testimony until the State asked him whether Boone provided accurate analysis.<sup>328</sup> Consequently, most of Owens' testimony came in without objection. Moreover, even if the defense had timely objected, the admission of Owens' constituted harmless error, because there was so much other, more compelling evidence of Farmer's guilt.<sup>329</sup>

### VI. HEARSAY (RULES 801 – 806)

#### *A. Out-of-Court Statement Related to Criminal Investigation*

In *Williams v. State*,<sup>330</sup> Williams appealed his conviction for misdemeanor marijuana possession, asserting that the trial court abused its discretion when it admitted evidence of the marijuana seized from him incident to his arrest on an outstanding arrest discovery during the course of his being stopped for a routine traffic violation.<sup>331</sup> Williams claimed that the trial court violated his constitutional rights when it admitted the evidence of the marijuana seized from his person incident to his arrest because the State failed to prove that the arrest was lawful. Williams failed to challenge the validity of the warrant that led to his arrest.<sup>332</sup>

In this case of first impression, the Indiana Court of Appeals ruled that the State was not under an affirmative obligation to produce an active arrest warrant, or to introduce the warrant at trial, where the defendant does not challenge the warrant's validity.<sup>333</sup> According to Rule 801(c), in the context of a criminal investigation, "[a]n out-of-court statement introduced to explain why a particular course of action was taken during a criminal investigation is not hearsay because it is not offered to prove the truth of the matter asserted."<sup>334</sup> The arresting officer

---

325. *Id.* at 709.

326. 908 N.E.2d 1192, 1197-99 (Ind. Ct. App. 2009).

327. *Id.*

328. *Id.* at 1200.

329. *Id.* at 1199-1200.

330. 898 N.E.2d 400 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 982 (Ind. 2009).

331. *Id.* at 401.

332. *Id.* at 402.

333. *Id.* at 402-03.

334. *Id.* at 403 n.1 (quoting *Ballard v. State*, 877 N.E.2d 860, 864 (Ind. Ct. App. 2007)).

did not testify as an out-of-court declarant—he did not testify as to the truth of any out of court statement—rather, “he testified in court as to his observation of an active warrant for Williams’s arrest and the course of action that he took as a result.”<sup>335</sup>

*B. Indiana’s Protected Person Statute and Indiana Evidence Rule 802*

In *Tyler v. State*,<sup>336</sup> the Indiana Supreme Court examined the admissibility of videotaped testimony made via Indiana’s Protected Person Statute (PPS)<sup>337</sup> where the same witness giving testimony via the PPS also testifies in open court regarding the same matters.<sup>338</sup> The court explained that videotaped testimony made pursuant to the PPS generally does not conflict with Rule 802’s prohibition on hearsay testimony, as Rule 802 provides for an exception for hearsay testimony otherwise permitted by law.<sup>339</sup> The court then invoked its supervisory powers to “elaborate on the permissible use of statements under the PPS.”<sup>340</sup> Though the statute specifically provided for the admissibility of prior videotaped testimony where the protected person testifies at trial, the Supreme Court held that the “testimony of a protected person may be presented in open court or by prerecorded statement through the PPS, but not both except as authorized under the Rules of Evidence.”<sup>341</sup>

*C. Then Existing State of Mind*

In *Pelley v. State*,<sup>342</sup> murder defendant Jeff Pelley argued that the trial court erred when it allowed the State to introduce statements made by his father and alleged murder victim, Bob Pelley, concerning restrictions he had placed on Jeff Pelley’s attendance of high-school prom activities.<sup>343</sup> The state argued that the statements were admissible to demonstrate Bob Pelley’s intent to keep his son from attending prom activities.<sup>344</sup> Jeff Pelley contended that the state of mind exception to the hearsay rule only applies to a victim’s statements when the defendant places the victim’s statements at issue.<sup>345</sup>

The Indiana Supreme Court explained that Rule 803(3) allows an exception to Rule 801(c)’s general prohibition on hearsay statement for statements of a declarant’s then existing state of mind, including intent, plan, mental feeling,

---

335. *Id.*

336. 903 N.E.2d 463 (Ind. 2009)

337. IND. CODE § 35-37-4-6 (2008).

338. *Tyler*, 903 N.E.2d at 465.

339. *Id.* at 467 (citing *Pierce v. State*, 677 N.E.2d 39, 43 n.6 (Ind. 1997)).

340. *Id.*

341. *Id.*

342. 901 N.E.2d 494 (Ind. 2009), *reh’g denied*, No. 71S05, 0808-CR-446, 2009 Ind. LEXIS 619 (Ind. May 13, 2009).

343. *Id.* at 504.

344. *Id.*

345. *Id.*



pain, and bodily health.<sup>346</sup> The fact that Bob Pelley was the victim was not critical, the court explained, as the exception is not limited to victims.<sup>347</sup> Moreover, the Supreme Court noted, it is not necessary that the defendant place the victim's state of mind at issue in order for the exception to apply to a victim's statements.<sup>348</sup>

In contrast, in *Camm v. State*, the Indiana Supreme Court found the trial court had committed a reversible error in admitting a statement purportedly made by the defendant's murdered wife, Kim Camm.<sup>349</sup> Cindy Mattingly, a friend of Kim Camm's, testified that Kim Camm told her, on the day Kim Camm and her children were murdered, that she was expecting her husband home between 7:00 and 7:30 p.m.<sup>350</sup> The statement clearly qualified as hearsay, so the question as to its admissibility was whether the statement fell within an exception to the hearsay rule.<sup>351</sup> The State argued that the statement was admissible under Rule 803(3) as a statement of the declarant's then-existing state of mind.<sup>352</sup> The Supreme Court rejected this argument, holding that although Rule 803(3) allows the admission of state-of-mind declarations to prove acts of conduct of the *declarant*, they are not admissible to as evidence of a third party's conduct.<sup>353</sup> The statement reflected the declarant's—Kim Camm's—expectation of her husband's future conduct, and thus it stood as inadmissible.<sup>354</sup> Because the statement placed the defendant at the scene of the crime at the time the crime was committed, the admission of this testimony constituted reversible error.<sup>355</sup>

The *Camm* court also addressed the question of whether Rule 801(d)(2)(E) bars evidence that is admissible under Rule 803(3).<sup>356</sup> Charles Boney was tried for the murders of the Camm family separately from David Camm.<sup>357</sup> David Camm claimed that Boney had acted alone, but the State claimed that the two men had worked in concert.<sup>358</sup> The defendant argued that the trial court erred by allowing Boney's girlfriend, Mala Singh Mattingly, to testify that he had told her on the day of the murders, that “he was going to help a buddy.”<sup>359</sup>

Under Rule 801(d)(2)(E), “a statement by a coconspirator of a party during

---

346. *Id.*

347. *Id.* at 504 n.5.

348. *See id.*

349. 908 N.E.2d 215, 225-26 (Ind.), *reh'g denied*, No. 87S00-0612-CR-499, 2009 Ind. LEXIS 1513 (Ind. Nov. 30, 2009).

350. *Id.* at 225.

351. *Id.* at 226.

352. *Id.*

353. *Id.* at 228.

354. *Id.*

355. *Id.*

356. *Id.* at 230.

357. *Id.* at 220. n.1.

358. *Id.* at 220-21.

359. *Id.* at 230.

the course and in furtherance of the conspiracy” does not qualify as hearsay.<sup>360</sup> As the defense pointed out, Rule 801(d)(2)(E) requires “independent evidence of a conspiracy prior to admission.”<sup>361</sup> David Camm argued that because the State treated him and Boney as coconspirators, the State’s use of Singh Mattingly’s testimony was subject to the requirements of Rule 801(d)(2)(E), which Camm asserted the State had failed to meet.<sup>362</sup> The Indiana Supreme Court rejected this argument, noting that Rule 802 prevents the admission of hearsay except as allowed by law or the Rules.<sup>363</sup> Because the evidence was admissible under the exception created by Rule 803(3), it was unnecessary to analyze it under Rule 801(d)(2)(E).<sup>364</sup> The court also rejected Camm’s argument that the evidence was inadmissible under Rule 403.<sup>365</sup>

#### *D. Admission of Out of Court Statements*

In *Bassett v. State*,<sup>366</sup> the State charged Bassett with the murder of his girlfriend, Jamie Engleking, and her two minor children.<sup>367</sup> At the time of the murders, Bassett was on parole. The terms of his parole prohibited him from engaging in “intimate or sexual relationship[s]” and from making contact with minor children.<sup>368</sup> The State contended that Bassett had murdered Engleking and her children to conceal his parole violations. Among other witnesses, the State called Karen Carroll, a friend of Engleking’s, to testify that Bassett and Engleking had carried on an intimate relationship.<sup>369</sup> After the defense subjected Carroll to “vigorous cross and re-cross-examination,” the trial court allowed the State to attempt to rehabilitate Carroll by asking her whether she had testified to the same fact in 2001, during Bassett’s first trial.<sup>370</sup> Bassett objected that such testimony was inadmissible under Rule 801 as hearsay. The Supreme Court disagreed with Bassett, concluding that Carroll’s prior consistent statement was admissible for the purposes of rehabilitating her testimony following cross and re-cross.<sup>371</sup>

#### *E. Prior Consistent Statements*

The *Bassett* court also addressed the admissibility of testimony by Lisa

---

360. *Id.* (quoting IND. R. EVID. 801(d)(2)(E)).

361. *Id.* (quoting Brief of Appellant at 34, *Camm*, 908 N.E.2d 215 (Ind. 2009)).

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. 895 N.E.2d 1201 (Ind.), *cert. denied*, 129 S. Ct. 1920 (2009).

367. *Id.* at 1204.

368. *Id.* at 1212.

369. *Id.* at 1213.

370. *Id.*

371. *Id.* at 1214-13.



Johnson, the wife of jailhouse informant Clarence Johnson.<sup>372</sup> Clarence Johnson testified that while he was in jail, Bassett had asked him to kill Chief Deputy Prosecutor Kathleen Burns.<sup>373</sup> Over the defendant's objection, the court admitted Lisa Johnson's testimony that her husband had told her of Bassett's request.<sup>374</sup> The Indiana Supreme Court explained that ordinarily, as an out-of-court statement offered for the truth of the matter asserted, Lisa Johnson's testimony concerning what her husband told her that Bassett had said would qualify as inadmissible hearsay under Rule 801(c).

Rule 801(d)(1)(B), however, provides an exception from this general rule where

[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony, offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, and made before the motive to fabricate arose.<sup>375</sup>

Bassett conceded that all the requirements of the exception were met—with one exception: Charles Johnson's statement to Lisa Johnson was not made before the motive to fabricate arose. The court disagreed. It noted that where there was no evidence implicating the declarant in the crime, the question of when the motive to fabricate arose was a "fact-sensitive inquiry" left to the discretion of the trial court.<sup>376</sup>

In *Bullock v. State*,<sup>377</sup> Bullock appealed his conviction of three counts of felony theft for stealing televisions from Wal-Mart on three occasions.<sup>378</sup> The court found that the trial court erred when it allowed the State to admit into evidence the recorded statement of Thomas Hornberger, who drove Bullock and his accomplice to Wal-Mart to steal the televisions. The State asserted that the recorded statement was admissible as a prior consistent statement under Rule 801(d)(1)(B).<sup>379</sup> The court disagreed with the State because Hornberger's motive to fabricate his recorded statement arose before he gave the recording, thereby rendering Rule 801(d)(1)(B) inapplicable.<sup>380</sup> Ultimately, the court found the error harmless because it presented cumulative evidence and counterbalanced with evidence of the lesser sentence afforded to Hornberger for providing the recorded statement.<sup>381</sup>

---

372. *Id.* at 1211.

373. *Id.* at 1210-11.

374. *Id.* at 1211.

375. *Id.* (citing IND. R. EVID. 801(d)(1)(B)).

376. *Id.*

377. 903 N.E.2d 156 (Ind. Ct. App. 2009).

378. *Id.* at 158.

379. *Id.* at 161.

380. *Id.* at 162.

381. *Id.*

*F. Statements of a Party-Opponent*

Rule 801(d)(2) allows, among other things, for the admission of hearsay statements that are

offered against a party and [are] (A) the party's own statement, in either an individual or representative capacity; or (B) a statement of which the party has manifested an adoption or belief in its truth . . . or (D) a statement made by the party's agent or servant concerning a matter within the scope of the agency or employment, during the existence of the employment.<sup>382</sup>

In *Irmscher Suppliers, Inc. v. Schuler*,<sup>383</sup> the court addressed the admissibility of two letters written by an employee of one the defendants, Irmscher, in which the employee acknowledged that window units sold to the plaintiffs by Irmscher (and which were manufactured by the other defendant, Pella) were defective.<sup>384</sup>

Specifically, the letters noted the opinion of Pella engineers that the window units were defective.<sup>385</sup> The court noted that the opinions of the Pella engineers were hearsay within hearsay.<sup>386</sup> Each layer of hearsay required an exception from the hearsay rule in order to qualify as admissible.<sup>387</sup> The court found that the statements were admissible against Pella under 801(d)(2)(A) and (D), as they were made by a Pella employee, offered at trial against Pella, and reported by an Irmscher employee acting as Pella's agent or intermediary.<sup>388</sup> Likewise, the statements were admissible against Irmscher under 801(d)(B) as an adoptive admission.<sup>389</sup>

*G. Excited Utterance*

In *Kimbrough v. State*,<sup>390</sup> the defendant was convicted of beating a co-worker, James Peoples, with a wooden table leg.<sup>391</sup> Officer Hebert, who arrived on the scene immediately after the beating, testified to what Peoples told him at that time.<sup>392</sup> The trial court determined that the testimony was admissible under the excited utterance to the hearsay rule.<sup>393</sup> The elements that must be shown for a statement to be admitted under the excited utterance exception are: "(1) a startling event occurs; (2) a statement is made by a declarant while under the

---

382. IND. R. EVID. 801(d)(2).

383. 909 N.E.2d 1040 (Ind. Ct. App. 2009).

384. *Id.* at 1045-46.

385. *Id.*

386. *Id.*

387. *Id.* at 1046 (citing *Barger v. Barger*, 887 N.E.2d 990, 993 (Ind. Ct. App. 2008)).

388. *Id.*

389. *Id.*

390. 911 N.E.2d 621 (Ind. Ct. App. 2009).

391. *Id.* at 632-33.

392. *Id.* at 628.

393. *Id.*



stress of excitement caused by the event; and (3) the statement relates to the event.”<sup>394</sup> Because Officer Herbert’s testimony showed that Peoples was still under the stress of his altercation with Kimbrough when Officer Herbert arrived, the trial court did not err when it admitted the testimony under the excited utterance exception.<sup>395</sup>

In *Morgan v. State*,<sup>396</sup> Morgan appealed his convictions for murder and robbery, claiming that the trial court erred and violated his Sixth Amendment Confrontation Clause rights by admitting the discovery depositions of Shana Belcher and Ocie Brasher.<sup>397</sup> The court noted that “[g]enerally, deposition testimony of an absent witness offered in court to prove the truth of the matter assert [see Rule 801(c)] constitutes classic hearsay.”<sup>398</sup> Morgan, citing Rule 804(b) argued Belcher’s deposition to be inadmissible under Rule 804 because he did not have a “similar motive to develop the testimony by direct, cross, or redirect examination” in the discovery deposition as he would have had in live trial testimony or a trial deposition.<sup>399</sup> The court found Morgan’s argument unpersuasive because, although Belcher’s deposition testimony was testimonial, Belcher “was clearly unavailable” and he did not lack a prior opportunity for cross-examination, thereby satisfying Morgan’s Sixth Amendment confrontation rights.<sup>400</sup>

The trial court found Brasher’s deposition testimony admissible under the Rule 804(a)(5) exception to the hearsay rule.<sup>401</sup> Rule 804(a)(5) provides that a witness is unavailable if a witness “is absent from the hearing and the proponent has been unable to procure the declarant’s attendance by process or other reasonable means.”<sup>402</sup> Morgan questioned the trial court’s finding that Brasher was “unavailable” to testify, asserting that the court should consider him unavailable due to the State’s “negligence” in failing to monitor him properly so as to secure his live testimony at trial. The court of appeals opined that Morgan’s equating of “negligence” with “wrongdoing” to be unpersuasive and as a result the trial court did not abuse its discretion by finding Brasher to be unavailable for purposes of Rule 804.<sup>403</sup>

In *Tiller v. State*,<sup>404</sup> the court again addressed the question of what it means

---

394. *Id.* (citing *Gordon v. State*, 743 N.E.2d 376, 378 (Ind. Ct. App. 2001)).

395. *Id.* at 633.

396. 903 N.E.2d 1010 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 993 (Ind. 2009).

397. *Id.* at 1012.

398. *Id.* at 1015 (quoting *Garner v. State*, 777 N.E.2d 721, 724 (Ind. 2002)).

399. *Id.* at 1016 (quoting Brief of Appellant at 21, *Morgan*, 903 N.E.2d 1010 (Ind. Ct. App. 2009)).

400. *Id.*

401. *Id.* at 1017.

402. IND. R. EVID. 804(a)(5).

403. *Morgan*, 903 N.E.2d at 1017.

404. 896 N.E.2d 537 (Ind. Ct. App. 2008), *reh’g denied*, No. 45A03-0802-CR-78, 2009 Ind. App. LEXIS 8 (Ind. Ct. App. Jan. 6, 2009).

for a declarant to be unavailable with the meaning of Rule 804(a)(5).<sup>405</sup> In this case, Tiller claimed that the State did not make reasonable efforts to secure the live testimony of Richard Cannon and as a result the reading into evidence his deposition testimony violated his right of confrontation under both the Sixth Amendment to the U.S. Constitution and article 1, section 13, of the Indiana Constitution.<sup>406</sup> The court viewed the steps taken by the State to secure Cannon's live testimony to be reasonable and as a result decline to hold the trial court's allowance of the testimony via the reading of deposition testimony into the record to be reversible error.<sup>407</sup>

#### *H. Multiple Layers of Hearsay Testimony*

In *Amos v. State*,<sup>408</sup> the court addressed a familiar issue of the admissibility of multiple layers of hearsay testimony.<sup>409</sup> In the present case, the State sought to admit what one witness's testimony regarding what a second witness told her (hearsay layer one) that Amos said (hearsay layer two) during their cell phone conversation.<sup>410</sup> This testimony contains hearsay (Amos's statement) within hearsay (the second witness's statement). Pursuant to Rule 805, each layer of hearsay must qualify under an exception to the hearsay rule before a court may admit the statement at issue into evidence.<sup>411</sup> Amos's statements to the second witness, the second layer of hearsay, were not hearsay because they were statements by a party-opponent (Rule 801(d)(2)(A)) in that they were statements made by Amos and offered against him at trial.<sup>412</sup> The court allowed the first layer of hearsay, under Rule 803(1), the present sense impression exception to the hearsay rule. In order for this testimony to fall under the present sense impression, three requirements must be met: "(1) it must describe or explain an event; (2) during or immediately after its occurrence; and (3) it must be based on the declarant's perception of the event."<sup>413</sup> The record revealed that these requirements had been met and that the trial court did not err in admitting the evidence.<sup>414</sup>

#### *I. Business Records*

In *King v. State*, the State convicted Andrew King of felony child solicitation

---

405. *Id.* at 544.

406. *Id.* at 543.

407. *Id.* at 544.

408. 896 N.E.2d 1163 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 979 (Ind. 2009).

409. *Id.* at 1167-68.

410. *Id.* at 1168.

411. *Id.*

412. *Id.* There were no Sixth Amendment issues because the statements were not testimonial. *Id.* at 1169 n.5.

413. *Id.* at 1168.

414. *Id.* at 1169.



and felony attempted dissemination of matter harmful to minors.<sup>415</sup> King's arrest and conviction resulted from an online child solicitation sting operation, in which the defendant made contact with a police officer posing as a fifteen-year-old girl under the screen name "vollygirl1234."<sup>416</sup> King sent volleygirl1234 pictures of himself, pictures of exposed penises, and arranged to meet "volleygirl1234" for sex.<sup>417</sup> The State issued a subpoena to Yahoo! requesting information relating to the account of the person who had contacted "volleygirl1234," which the State ultimately determined was King.<sup>418</sup> Based on information received from Yahoo!, the State issued an additional subpoena to an Internet service provider. Using information provided by the Internet service provider, the State tracked the internet protocol ("IP") address of the computer used to send instant online messages to volleygirl1234 to Crossroads Bible School, where King was a student.<sup>419</sup> With records from the Bureau of Motor Vehicles, police identified King as the perpetrator and found him at the Crossroads Bible School.<sup>420</sup>

At trial, King objected to the admission of records subpoenaed from Yahoo! and the Internet service provider.<sup>421</sup> Over King's objection, the court admitted the records under Rule 803(6), which provides an exception from the hearsay rule for records kept in the course of regularly conducted business activity. Such records remain inadmissible where "the source of information or the method or circumstances of preparation indicate a lack of trustworthiness."<sup>422</sup> Because Yahoo! could not, and did not, provide any verification that the account information it provided was connected to King, the Indiana Court of Appeals concluded that the circumstances indicated a lack of trustworthiness, and thus the trial court erred in admitting the account information under Rule 803(6).<sup>423</sup>

On the other hand, the Indiana Court of Appeals found that the records from the Internet service provider were properly admitted.<sup>424</sup> The fact that the actual documents produced, which contained a summary of electronically-stored data concerning the IP address from which King contacted volleygirl1234, were not themselves kept in the regular course of business, did not render the documents inadmissible.<sup>425</sup> The underlying data, not the summary thereof, must be kept in

---

415. *King v. State*, 908 N.E.2d 673, 676 (Ind. Ct. App.), *trans. granted*, 919 N.E.2d 556 (Ind. 2009), *aff'd*, 921 N.E.2d 1288 (Ind. 2010). The Indiana Supreme Court only granted transfer in this case "to resolve a decisional conflict regarding the effect of an adult recipient posting as a minor in prosecutions for [the] attempted crime [in this case]." *King*, 921 N.E.2d at 1289. The court summarily affirmed the Indiana Court of Appeals' decision as to all other issues. *Id.*

416. *King*, 908 N.E.2d at 675.

417. *Id.*

418. *Id.* at 677.

419. *Id.* at 676.

420. *Id.*

421. *Id.* at 676-83.

422. *Id.* at 678 (quoting IND. R. EVID. 803(6)).

423. *Id.* at 681.

424. *Id.* at 682-83.

425. *Id.* at 683.

the regular course of business.<sup>426</sup>

Records of regularly conducted business activities may be authenticated through the use of an affidavit from an appropriate person, rather than by a witness's in-court testimony, through the combination of Rules 803(6) and Rule 902(9) or 902(10). In *Ziobron v. Squire*,<sup>427</sup> Mary Ziobron attempted to "bolster" Drs. Ferrara and Judd testimony "with medical records pertaining to the mass inside of [her] pelvis that was a suspected retained left ovary" in this medical malpractice action.<sup>428</sup> But Ziobron failed to properly certify these records in accordance with Rules 803(6) and 902(9) and the trial court properly excluded said records from consideration.<sup>429</sup>

### *J. Public Records and Reports*

In *IDEM v. Steel Dynamics, Inc.*,<sup>430</sup> the court considered the issue of whether an IDEM inspection report is considered an investigative report under Rule 803(8)—the public records exception to the hearsay rule.<sup>431</sup> Steel Dynamics, Inc. (SDI) claimed "that the inspection report contained inadmissible hearsay which did not fall within the public records exception to the hearsay rule because the report amounted to an investigative report."<sup>432</sup> IDEM claimed that the inspection report would not be classified as an investigative report and a result fell with the Rule 803(8) public records exception to the hearsay rule.<sup>433</sup> The inspection report was important because it indicated that an EAF dust spill occurred at SDI's facility.<sup>434</sup> The court of appeals never reached the question of whether the report fell under the Rule 803(8) exception to the hearsay rule, because it found that SDI waived such an objection due to its submission of the report to the ELJ as an exhibit to its own motion for summary judgment.<sup>435</sup>

### *K. Statements Against Interest*

In *Camm v. State*, David Camm, convicted of murdering his wife and children, argued that the trial court erred when it excluded certain self-inculpatory statements of Charles Boney, who was tried and convicted separately for the murders of Camm's family.<sup>436</sup> Boney told an investigator that if the State

---

426. *Id.*

427. No. 29A04-0804-cv-235, 2008 Ind. App. LEXIS 2637 (Ind. Ct. App. Oct. 7, 2008).

428. *Id.* at \*15-16.

429. *Id.* at \*15.

430. 894 N.E.2d 271 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 982 (Ind. 2009).

431. *Id.* at 276.

432. *Id.*

433. *Id.*

434. *Id.*

435. *Id.* at 276-77. "A party may not submit evidence and then claim error based upon the consideration of such evidence." *Id.* at 277 (citing *Beeching v. Levee*, 764 N.E.2d 669, 674 (Ind. Ct. App. 2002)).

436. 908 N.E.2d 215, 229-30 (Ind. 2009), *reh'g denied*, No. 87S00-0612-CR-499, 2009 Ind.



found physical evidence of Boney's presence at the crime scene, it was "pretty obvious" that Boney was involved.<sup>437</sup> Boney also told a friend, after the killings, that "he had three bodies on his conscience, and that one more wouldn't matter."<sup>438</sup> The State asserted that there was no issue that Boney was present at the scene of the crime and that he participated in the murders. The only issue was whether Boney acted alone or in concert with Camm, and the evidence in question was irrelevant to the resolution of that issue.<sup>439</sup> Thus, the State contended that the evidence was irrelevant and inadmissible under Rule 402. The court acknowledged the strength of the State's argument, but noted that there was an alternate basis for exclusion.<sup>440</sup>

Because Boney's statements qualified as hearsay, the question was whether an exception applied.<sup>441</sup> Camm argued that the statements were admissible under Rule 804(b)(3), which provides for the admission of statements by an unavailable witness, where such statements, at the time they are made, so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he believed it to be true.<sup>442</sup> In this case, the court found that the statements did not tend to subject Boney to criminal liability or constitute an admission of a crime. Thus, the trial court properly excluded them.<sup>443</sup>

## VII. AUTHENTICATION AND IDENTIFICATION (RULES 901 – 903)

In *Hape v. State*,<sup>444</sup> the court addressed the issue of authentication of text messages on cellular telephones. The court held the authentication of text messages on a cellular telephone a condition precedent to the admission of the texts.<sup>445</sup> The court further held that such authentication may be accomplished using Rule 901(a) in the same manner that parties use this rule to authenticate files from computers.<sup>446</sup>

---

LEXIS 1513 (Ind. Nov. 30, 2009).

437. *Id.* at 232.

438. *Id.*

439. *Id.*

440. *Id.* at 232-33.

441. *Id.* at 233.

442. *Id.*

443. *Id.*

444. 903 N.E.2d 977 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 994 (Ind. 2009).

445. *Id.* at 990.

446. *Id.*; *see also* *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 546 (D. Md. 2007) ("observing that federal courts have recognized [FED. R. EVID.] 901(b)(4) as a means to authenticate electronic data, including text messages").

VIII. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS  
(RULES 1001 – 1008)

In *Rogers v. State*,<sup>447</sup> Rogers appealed his conviction for theft in part asserting that the trial court abused its discretion when it admitted evidence elicited from CVS's surveillance footage.<sup>448</sup> CVS provided a copy of the footage to the Vanderburgh County Prosecutor's office on a disc. The Prosecutor's office created four photographs from the footage on the disc. The State introduced the disc and four photographs created from the surveillance footage disc at Rogers's trial.<sup>449</sup> Rogers argued that the State failed to lay a proper foundation for the admission of the disc because CVS's supervisor "admitted he left out portions of the hard drive for the relevant time period and that he never checked the CD against the hard drive."<sup>450</sup>

The Rules permit the introduction of substantive photographic evidence under the "silent witness" theory, which requires "a strong showing of authenticity and competency."<sup>451</sup> The court held that the State met its burden under the "silent witness" theory. It likewise established that the CD and photographs had not been altered in any way.<sup>452</sup> The court found the introduction of duplicate copies permissible under Rules 1001(4) and 1003.<sup>453</sup>

CONCLUSION

The Indiana appellate courts addressed a number of important evidentiary issues in 2009 and continued to shape the rules of evidence in the State of Indiana.

---

447. 902 N.E.2d 871 (Ind. Ct. App. 2009).

448. *Id.* at 874.

449. *Id.*

450. *Id.* at 876. "Before photographic evidence may be admitted, an adequate foundation must be laid." *Id.* (citing *Bergner v. State*, 397 N.E.2d 1012, 1014 (Ind. Ct. App. 1979)). "Our courts have consistently held this requires the testimony of a witness who can state the photograph is 'a true and accurate representation of the things it is intended to depict.'" *Id.* (quoting *Bergner*, 397 N.E.2d at 1014).

451. *Id.* (quoting *Edwards v. State*, 762 N.E.2d 128, 136 (Ind. Ct. App. 2002) (discussing admission of a videotape)).

452. *Id.* at 877.

453. *Id.*



# SURVEY OF RECENT DEVELOPMENTS IN INSURANCE LAW

RICHARD K. SHOULTZ\*

During this survey period,<sup>1</sup> Indiana courts addressed a number of interesting factual scenarios and coverage issues involving automobile insurance policies, homeowners insurance policies, and commercial general liability insurance policies. This Article examines the most significant decisions and their impact on the field of insurance law.<sup>2</sup>

## I. AUTOMOBILE COVERAGE CASES

### *A. No Insurance Available to Grandmother for Her Liability Arising from Her Agreement to Be Legally Responsible for Minor's Driving Under the Financial Responsibility Statute*

When a minor driver initially obtains his or her license, a parent or guardian of the minor, must sign a financial responsibility form. This form makes the parent or guardian responsible for any legal liability resulting from injuries or damages caused by the minor.<sup>3</sup> In *Motorists Mutual Insurance Co. v.*

---

\* Partner, Lewis Wagner, LLP. B.A., 1987, Hanover College; J.D., 1990, Indiana University School of Law—Indianapolis.

1. The survey period for this Article is approximately October 1, 2008 to September 30, 2009.

2. Selected cases which were decided during the survey period, but are not addressed in this Article include: *Harleysville Lake State Insurance Co. v. Granite Ridge Builders, Inc.*, Cause No. 1:06-CV-397-TS, 2009 WL 857412 (N.D. Ind. Mar. 31, 2009) (holding that equitable estoppel can bind an insurer to coverage if the insurer defends the insured without sending a reservation of rights notice to the insured); *Evanston Insurance Co. v. Deer-Bell, Inc.*, No. 1:07-cv-1160-SEB-JMS, 2009 WL 398969 (S.D. Ind. Feb. 13, 2009) (interpreting whether exclusion for acts or incidents involving battery applied for incident at bar); *Hastings Mutual Insurance Co. v. LaFollette*, No. 1:07-cv-1085-WTL-TAB, 2009 WL 348769 (S.D. Ind. Feb. 6, 2009) (interpreting whether a tenant qualified as a “voluntary worker” to be afforded insurance coverage under landlord’s policy after swimming accident by third party); *American Family Mutual Insurance Co. v. Estate of Sloan*, No. 1:07-cv-0327-SEB-JMS, 2008 WL 5115245 (S.D. Ind. Dec. 3, 2008) (holding that purchaser of an automobile was not a “permissive user” to be afforded coverage under seller’s insurance policy for accident when purchaser took possession and started to make installment payments); *Travelers Casualty & Surety Co. v. U.S. Filter Corp.*, 895 N.E.2d 1172 (Ind. 2008) (holding that consent of an insurance company is needed by an insured before insurance policy rights can be assigned by the insured unless the assignment happens after an identifiable loss occurs); *Sadler v. Auto-Owners Insurance Co.*, 904 N.E.2d 665 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 548 (Ind. 2009) (holding that insured was not precluded from seeking reimbursement for remediation costs from one of multiple insurance companies after receiving insurance benefits from other insurers.); *Schilling v. Huntington County Community School Corp.*, 898 N.E.2d 385 (Ind. Ct. App. 2008) (holding that a health plan’s exclusion for injuries covered by workers compensation was valid even if employee lacked workers compensation insurance coverage), *trans. denied*, 915 N.E.2d 993 (Ind. 2009).

3. IND. CODE § 9-24-9-4(a) (2004) provides that “[a]n individual who signs an application for a permit or license under this chapter agrees to be responsible jointly and severally with the

*Wroblewski*,<sup>4</sup> the court addressed whether a grandmother who signed a financial responsibility form for her grandson was entitled to coverage under her personal insurance policy for a judgment entered against her.<sup>5</sup>

The grandson lived with his grandparents.<sup>6</sup> When the grandson turned sixteen years old, the grandparents purchased him a car, which they titled in his name, and purchased a liability insurance policy in his name.<sup>7</sup> The grandmother signed the financial responsibility form with the Bureau of Motor Vehicles when the grandson obtained his license.<sup>8</sup> The grandson had an automobile accident that resulted in personal injuries to his passenger, Alexis.<sup>9</sup> Alexis sued the grandson for negligence in his operation of the automobile, and the grandmother based upon her signing of the financial responsibility form.<sup>10</sup> The court entered judgment against the grandson and grandmother for \$99,422.19.<sup>11</sup>

The grandmother possessed automobile liability insurance under a policy with Motorists that covered automobiles that she owned, but not the vehicle driven by the grandson at the time of the accident.<sup>12</sup> After the court entered the judgment, Alexis filed supplemental proceedings against Motorists, contending that it owed insurance coverage to the grandmother under her policy.<sup>13</sup> Motorists contended that no coverage was available because of a policy provision that excluded coverage for any vehicle other than a covered vehicle that was owned by or available for regular use of a family member.<sup>14</sup> The trial court granted summary judgment to Alexis after finding that Motorists owed coverage to the grandmother.<sup>15</sup> Motorists appealed.<sup>16</sup>

The court of appeals reversed the trial court.<sup>17</sup> Although the grandmother was legally responsible because she signed the financial responsibility form, the court applied the Motorists policy provision, and found that the policy excluded coverage for any liability of an insured based upon the use of another vehicle

---

minor applicant for any injury or damage that the minor applicant causes by reason of the operation of a motor vehicle if the minor applicant is liable in damages.”

4. 898 N.E.2d 1272 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 989 (Ind. 2009).

5. *Id.* at 1274.

6. *Id.* at 1273.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 1274.

12. *Id.*

13. *Id.*

14. *Id.* at 1276.

15. *Id.* at 1274. The trial court based its decision upon the policy language where Motorists agreed to “pay damages for bodily injury . . . for which any insured becomes legally responsible because of an auto accident.” *Id.* at 1275.

16. *Id.*

17. *Id.* at 1277.



owned by a family member.<sup>18</sup> Because the grandmother's liability was based upon the grandson's use of his personal automobile, the exclusion applied.<sup>19</sup>

Any parent, guardian, or other individual who agrees to be responsible for a minor driver should be aware of both this decision and the statutory obligations Indiana imposes regarding a minor's operation of a vehicle. Those agreeing to be responsible for a minor driver must exercise care to make sure appropriate insurance coverage is in place to protect them.

*B. Shared Use of "Farm Truck" by Farmers Did Not Trigger Exclusion for Unlisted Vehicles Available for Regular Use of Non-Insured Drivers*

A case involving two farmers' shared use of a truck presented an interesting insurance coverage question in *Buckeye State Mutual Insurance Co. v. Carfield*.<sup>20</sup> A father and son owned separate farms, but shared equipment necessary to work each farm.<sup>21</sup> The father purchased a pickup truck, which they used as a "farm truck."<sup>22</sup> The father and son alternated use of the truck such that one of them would drive the truck when the other was using the heavy farm equipment for farming operations.<sup>23</sup>

While driving the truck, the son had an accident resulting in the death of another motorist.<sup>24</sup> The son's automobile insurer filed a declaratory judgment lawsuit to seek a judicial declaration that it did not owe the son liability insurance coverage based on a policy exclusion prohibiting coverage for the operation of uninsured vehicles available for the "regular use" of the son.<sup>25</sup> A bench trial occurred, and the trial court concluded that the evidence did not demonstrate that the truck was "available for [the son's] regular use," and thus the incident did not fall within the policy exclusion.<sup>26</sup>

On appeal, the court of appeals affirmed the trial court.<sup>27</sup> Although the court acknowledged the son had "periodic use" of the truck, the level of use did not show a "consistent, regular use" to fall within the exclusion.<sup>28</sup> The court observed that the evidence demonstrated that the truck was used sixty-two days of the year during the spring planting and fall harvesting seasons.<sup>29</sup> Absent a

---

18. *Id.* at 1276.

19. *Id.* at 1277.

20. 914 N.E.2d 315, 317 (Ind. Ct. App. 2009).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* The specific exclusionary language provided; "[The insurer does] not provide Liability Coverage for the ownership, maintenance or use of: . . . 2. Any vehicle, other than 'your covered auto,' which is . . . Furnished or available for [the insured's] regular use." *Id.*

26. *Id.*

27. *Id.* at 316.

28. *Id.* at 319.

29. *Id.*

recurring use of the truck throughout the year by the son, the court felt that the exclusion did not apply.<sup>30</sup>

The courts could have interpreted this case's facts and their application to the policy exclusion either way. Because the case was decided following a bench trial, the appellate court appeared reluctant to overturn the decision as it refused to reweigh the evidence. A different set of facts could lead to a different conclusion on the application of the "regular use" exclusion.

*C. Parents Could Not Recover Uninsured Motorists Coverage Under Their Policy for Death of Adult Son Who Was Not an Insured Under the Policy*

*Bush v. State Farm Mutual Automobile Insurance Co.*<sup>31</sup> addressed an attempt by the parents of an adult son to recover uninsured motorist coverage under their personal policy for their son's death.<sup>32</sup> Their son was killed in an accident while riding as an automobile passenger.<sup>33</sup> The driver of the car was uninsured, and neither the son nor the vehicle in which he was riding was insured for uninsured motorists coverage.<sup>34</sup> The parents sought uninsured motorist coverage under their personal insurance policy.<sup>35</sup> The insurer denied their claim because their son was not an "insured" as defined by the policy because he was a "relative" of the parents and did not reside in their home.<sup>36</sup>

The parents filed suit against their insurer to recover for the death of their adult son.<sup>37</sup> After both the parents and the insurer filed motions for summary judgment, the trial court granted the insurer's motion, finding that the adult son was not an "insured," and that the parents sustained no "bodily injury" to be afforded coverage.<sup>38</sup> The Indiana Court of Appeals reversed, concluding that the insurer's policy requirement that an insured sustain "bodily injury" in order for coverage to apply, violated Indiana's Uninsured Motorist Statute.<sup>39</sup>

The Indiana Supreme Court found that the insurer's policy language did not violate Indiana statutory requirements and affirmed the trial court's grant of summary judgment.<sup>40</sup> In addressing an issue of first impression, the court focused on whether the insurer's policy requirement that an insured must sustain "bodily injury" in order to obtain uninsured motorist coverage, violated Indiana's Uninsured Motorist Statute.<sup>41</sup> The court rejected the parents' argument that the

---

30. *Id.*

31. 905 N.E.2d 1003 (Ind. 2009).

32. *Id.* at 1004.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. IND. CODE § 27-7-5-2 (Supp. 2009); *Bush*, 905 N.E.2d at 1004-05.

40. *Bush*, 905 N.E.2d at 1007-08.

41. *Id.* at 1005.



policy was ambiguous because it could be construed to include emotional distress damages sustained by an insured even absent a purely physical injury.<sup>42</sup> The court observed that it recently addressed this issue and held that the definition of “bodily injury” included claims for emotional distress if accompanied by a bodily touching.<sup>43</sup>

The court ultimately concluded that the insurer’s policy restriction was valid.<sup>44</sup> Consequently, because the parents sustained no “bodily injury” from the accident that killed their son, they were not entitled to recover on their claims for uninsured motorist coverage.<sup>45</sup> The interpretation of the policy appears to support this decision. If the parents were successful with their argument, then the scope of uninsured motorist coverage would have been extended to cover individuals who could not successfully sue under Indiana’s wrongful death statutes. In Indiana, the son’s estate, not the parents individually, has the right to bring a tort lawsuit for the son’s death.<sup>46</sup> In this case, the parents, not the son’s estate, were seeking the uninsured motorist coverage.

*D. An Insurer’s Payment of Medical Bills Under Medical Payments Coverage Could Not Be Set Off Against Uninsured Motorist Exposure as an Advance Payment*

The court in *Nealy v. American Family Mutual Insurance Co.*<sup>47</sup> addressed whether an uninsured motorist insurer was entitled to deduct amounts advanced to its insured under Indiana’s advance payment statute.<sup>48</sup> A mother and daughter, who were insured with American Family, were involved in an accident with an uninsured motorist.<sup>49</sup> The mother and daughter plaintiffs filed a lawsuit against the uninsured driver and the owner of the vehicle who was also uninsured.<sup>50</sup> After the mother and daughter obtained default judgments against the driver and owner, American Family intervened to address its potential uninsured motorist coverage exposure.<sup>51</sup>

Before trial, American Family paid some of the medical bills incurred by the

---

42. *Id.*

43. *Id.* See *State Farm Mut. Auto. Ins. Co. v. Jakupko*, 881 N.E.2d 654, 658 (Ind. 2008).

44. *Id.* at 1004.

45. *Id.* at 1005.

46. The Indiana Supreme Court commented upon this issue in dicta. Specifically, the parents were not “persons ‘legally entitled to recover damages’” for the son’s death. *Id.* at 1008 (citing *Estate of Sears ex rel. Sears v. Griffin*, 771 N.E.2d 1136, 1138 (Ind. 2002)). Under Indiana’s Child Wrongful Death Act, IND. CODE § 34-23-2-1(d) (Supp. 2009), and the Adult Wrongful Death Act, IND. CODE § 34-23-1-2(b) (2008), only the estate could bring a lawsuit to recover damages for the son’s death.

47. 910 N.E.2d 842 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 559 (Ind. 2009).

48. *Id.* at 845; IND. CODE § 34-44-2-3 (2008).

49. *Nealy*, 910 N.E.2d at 845.

50. *Id.*

51. *Id.*

mother and daughter.<sup>52</sup> An American Family representative sent a letter to the mother and daughter explaining that American Family paid the bills under the policy's medical payments coverage rather than the uninsured motorist coverage.<sup>53</sup> At trial, the mother and daughter obtained verdicts against American Family for uninsured motorist coverage.<sup>54</sup> Relying upon the advance payment statute,<sup>55</sup> American Family tendered checks that deducted the amounts previously paid for the family's medical bills from the verdict award.<sup>56</sup> The mother and daughter filed a motion with the court asking that it reject American Family's claim that it was entitled to set off its payments for medical bills from the verdict for uninsured motorist coverage.<sup>57</sup> The trial court granted American Family's motion to permit the setoff, and an appeal ensued.<sup>58</sup>

The advance payment statute provides:

If it is determined that the plaintiff is entitled to recover in an action [for personal injury, wrongful death, or property damage]:

- (1) the defendant may introduce evidence of any advance payment made; and
- (2) the court shall reduce the award to the plaintiff to the extent that the award includes an amount paid by the advance payment.<sup>59</sup>

The appellate court focused on the wording of this statute, and concluded that American Family's payments to the mother and daughter were not "advance payments" under the statute.<sup>60</sup> The court acknowledged that the purpose of the statute was to prevent double recovery by a personal injury plaintiff if an insurance company made an advance payment for medical bills.<sup>61</sup> But the court determined that American Family was not a "defendant" as required by the advance payment statute and thus was not allowed to utilize the setoff.<sup>62</sup> American Family was not an entity who was liable to the mother/daughter from a personal injury accident but owed contractual liability as a medical payments insurer.<sup>63</sup>

The court also looked at whether the American Family insurance policy language permitted a setoff.<sup>64</sup> Although the policy explicitly authorized American Family to deduct the medical bills paid from the limits of medical

---

52. *Id.*

53. *Id.*

54. *Id.*

55. IND. CODE § 34-44-2-3 (2008).

56. *Nealy*, 910 N.E.2d at 845.

57. *Id.*

58. *Id.*

59. *Id.* (quoting IND. CODE § 34-44-2-3 (2008)).

60. *Id.*

61. *Id.*

62. *Id.* at 846.

63. *Id.*

64. *Id.* at 847.



payments coverage, the policy did not allow American Family to deduct payments made under the medical payments portion of the policy from the uninsured motorist coverage.<sup>65</sup> Because American Family said that the payment of the medical bills was made under the medical payments coverage rather than the uninsured motorist coverage, setoff was not permitted.<sup>66</sup> As a result, the court reversed the trial court order.<sup>67</sup>

Chief Judge Baker, concurring in part and dissenting in part, believed that the advance payment statute applied to allow American Family's setoff.<sup>68</sup> Although acknowledging that the facts and party designations did not strictly follow the advance payments statute, Chief Judge Baker argued that not allowing a setoff would result in an unjust, double recovery in damages by the mother and daughter.<sup>69</sup> The purpose of the statute is to avoid double recovery by a party for the same element of damages.<sup>70</sup> Chief Judge Baker believed that the purpose was not achieved in this case without a setoff or reimbursement of the medical payments to the insurer.<sup>71</sup>

*E. Insurance Company Prevented from Denying Coverage After It Failed to Provide Sufficient Notice of Coverage Defense to Insured*

The case of *Founders Insurance Co. v. Olivares*<sup>72</sup> provides a glimpse of how an insurer will be prevented from asserting a policy defense if proper notice is not given to the insured.<sup>73</sup> Founders insured an automobile owned by a mother and son.<sup>74</sup> The Founders' insurance policy listed the mother as a named insured, and listed her husband as an additional insured.<sup>75</sup> The policy listed the son as an excluded driver.<sup>76</sup> Although the policy listed the mother as residing in Indiana, she actually lived in New Jersey.<sup>77</sup> The vehicle remained and the son resided in Indiana.<sup>78</sup>

A motorist was injured in an accident with a person driving the automobile owned by the mother and son.<sup>79</sup> The driver fled the scene of the accident, and

---

65. *Id.* at 847-48.

66. *Id.* at 848.

67. *Id.* at 850.

68. *Id.* (Baker, C.J., dissenting in part and concurring in part).

69. *Id.*

70. *Id.*

71. *Id.*

72. 894 N.E.2d 586 (Ind. Ct. App. 2008).

73. *Id.* at 592-93.

74. *Id.* at 588.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

was never identified.<sup>80</sup> After the accident, the son told the police that someone stole the vehicle.<sup>81</sup> The injured motorist notified Founders that she intended to allege in a lawsuit that the son was driving the vehicle at the time of the accident.<sup>82</sup> Founders responded by indicating to the injured motorist that it reserved its rights to deny coverage based upon the lack of permission of the driver to use the vehicle at the time of the accident.<sup>83</sup>

The injured motorist sued the mother and son.<sup>84</sup> Founders was advised of the lawsuit, and retained counsel to represent the mother and son.<sup>85</sup> Later, Founders was added as a defendant, and the injured motorist and Founders sought a declaratory judgment to establish whether they owed coverage to the son.<sup>86</sup> During the trial, Founders presented evidence that it prepared a letter to the mother and son<sup>87</sup> that said that if the son was driving the automobile at the time of the accident, no coverage would be available.<sup>88</sup> But no evidence was presented at trial that confirmed that Founders sent the letter or that the mother or son received the letter.<sup>89</sup>

At a bench trial, the trial court determined that the son was an insured driver under Founders' insurance policy.<sup>90</sup> The trial court also found that because Founders had not issued a reservation of rights to its insureds advising of the son's exclusion from the policy, the court prevented Founders from asserting that as a coverage defense.<sup>91</sup>

The court of appeals affirmed the trial court.<sup>92</sup> The court of appeals acknowledged the general rule that the doctrine of estoppel cannot be used to create coverage under an insurance policy.<sup>93</sup> But the court noted that an exception exists if the insurer assumes the defense of an insured, and fails to reserve its own rights to contest coverage by giving proper notice to the insured.<sup>94</sup>

---

80. *Id.*

81. *Id.* There was no sign of damage to the steering column to suggest that someone had started the vehicle without the keys. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 589.

85. *Id.*

86. *Id.*

87. Founders admitted there was a typographical error regarding the first name of its insured in this letter. Founders referred to the individual as "David" when his actual first name was "Daniel."

88. *Id.*

89. *Id.*

90. *Id.* at 591.

91. *Id.*

92. *Id.* at 594.

93. *Id.* at 592. The rationale behind this rule is that an insurer should not be compelled to insure a risk where the insured had not paid a premium to cover the risk. *Id.* (citing *Employers Ins. of Wausau v. Recticel Foam Corp.*, 716 N.E.2d 1015, 1028 (Ind. Ct. App. 1999)).

94. *Id.* at 592-93.



Because Founders failed to factually establish that it had provided a proper reservation of rights to the mother and son, the court estopped Founders from asserting this coverage defense.<sup>95</sup>

This case is another example of how an insurer can be prevented from asserting policy defenses if the insurer fails to properly reserve its rights to contest coverage or file a declaratory judgment action to determine its coverage obligations. Insurers must follow one of these procedures to avoid being estopped from asserting its coverage defenses.<sup>96</sup>

## II. HOMEOWNERS INSURANCE COVERAGE CASE

As more homeowners acquire all-terrain vehicles (“ATVs”) and accidents from their use occur, questions arise regarding whether various types of insurance policies provide coverage. In *McCoy v. American Family Mutual Insurance Co.*,<sup>97</sup> the plaintiffs sought liability insurance coverage under a homeowners policy after an accident resulted in personal injuries to a guest using an ATV.<sup>98</sup> Shoemaker, who was living with McCoy and her children, owned the ATV.<sup>99</sup> The children invited one of their friends to visit and to operate the ATV.<sup>100</sup> Although McCoy was present when the children started to ride the ATV, she left before the guest drove it.<sup>101</sup> Shoemaker remained with the children, and the guest was injured while using the ATV in his presence.<sup>102</sup>

The guest’s representatives sued McCoy seeking recovery for the guest’s injuries.<sup>103</sup> The representatives obtained a default judgment against McCoy when she did not answer the complaint.<sup>104</sup> At the time of the accident, McCoy possessed a homeowners insurance policy with American Family.<sup>105</sup> American Family filed a declaratory judgment action and contended that the homeowners policy excluded coverage for McCoy.<sup>106</sup> The exclusion provided that personal

---

95. *Id.* at 593. The court also determined that the son was prejudiced as a matter of law by Founders’s assumption of his defense without reserving its rights. *Id.* at 594.

96. For a good example of the ramifications of an insurer failing to proceed under these options, see *Liberty Mutual Insurance Co. v. Metzler*, 586 N.E.2d 897 (Ind. Ct. App. 1992).

97. 898 N.E.2d 1237 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 984 (Ind. 2009).

98. *Id.* at 1238.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* McCoy had a conversation with her insurance agent who apparently informed her there would be no coverage under the American Family policy for the visitor’s lawsuit. *Id.* Believing that no coverage existed, McCoy did not notify American Family of the lawsuit. *Id.* While American Family asserted this alleged “late notice” issue as a coverage defense, the court did not address it.

liability coverage did not exist for “bodily injury or property damage arising out of the ownership, supervision, entrustment, maintenance, operation, use, loading or unloading of any type of motor vehicle, motorized land conveyance or trailer.”<sup>107</sup>

In the declaratory judgment proceeding, the guest argued that an exception to this exclusion applied as coverage was afforded for vehicles “owned or operated or rented or loaned to any **insured**.”<sup>108</sup> Specifically, the visitor argued that the ATV was “loaned” to McCoy by Shoemaker; therefore, coverage under the homeowners policy applied.<sup>109</sup>

The trial court granted summary judgment to American Family, finding the exclusion applied.<sup>110</sup> The Indiana Court of Appeals affirmed.<sup>111</sup> The court rejected the suggestion that the ATV was loaned to McCoy.<sup>112</sup> At the time of the accident, Shoemaker, the owner of the ATV, was present and directing its use.<sup>113</sup> The court noted that if the ATV was loaned to anyone, it was loaned to the child visitor, not McCoy.<sup>114</sup>

This case presented an excellent analysis of application of a policy exclusion. The risk of use of any vehicle, including ATVs, is not one that a homeowners insurer would agree to assume. Instead, a separate policy is generally needed to provide the appropriate coverage for the ATV use.

### III. COMMERCIAL AND PROPERTY COVERAGE CASES

#### *A. Court Waived an Insurance Policy Condition Because of Insurance Company's Delay in Paying Undisputed Portion of Claim*

The decision of *Rockford Mutual Insurance Co. v. Pirtle*<sup>115</sup> demonstrates the risk to an insurance company when it delays making payments to its insured for a property claim.<sup>116</sup> The facts reveal that an insured sustained damage to a historic building from a fire.<sup>117</sup> At the time of the fire, the insured rented the building to tenants while the building was being restored.<sup>118</sup> After the fire, the insured submitted a claim for replacement cost coverage under its insurance

---

107. *Id.* at 1239.

108. *Id.*

109. *Id.*

110. *Id.* at 1238.

111. *Id.* at 1239.

112. *Id.*

113. *Id.*

114. *Id.*

115. 911 N.E.2d 60 (Ind. Ct. App. 2009), *reh'g denied*, 2009 Ind. App. LEXIS 2397 (Ind. Ct. App. Oct. 28, 2009).

116. *Id.* at 69-69.

117. *Id.* at 63.

118. *Id.*



policy with Rockford.<sup>119</sup>

Rockford hired an independent adjuster to assist in estimating the damage to the building.<sup>120</sup> After the adjuster arrived at an estimate, Rockford gave the adjuster settlement authority to try to reach a settlement with the insured.<sup>121</sup> But the settlement offer was less than the mortgage that existed on the property and the estimates that the insured had obtained to repair the building.<sup>122</sup> The insured rejected the adjuster's settlement offer and submitted a repair estimate to Rockford that exceeded the limits of the policy.<sup>123</sup> Rockford granted the adjuster additional settlement authority up to the policy limits.<sup>124</sup> Despite Rockford's authorization of a settlement of the claim up to the dwelling policy limits, the adjuster made an offer for a lesser figure, which it contended was the "actual cash value" of the building at the time of the fire.<sup>125</sup>

Rockford retained another independent adjuster who submitted a slightly higher offer as actual cash value for the damaged building.<sup>126</sup> The insured did not respond to the offer.<sup>127</sup> Instead, the insured filed a lawsuit against Rockford for breach of contract and breach of the duty of good faith that Rockford owed to its insured.<sup>128</sup> The court dismissed the claim for breach of the duty of good faith when Rockford tendered the actual cash value figure suggested by the second adjuster.<sup>129</sup> Upon receipt of these funds, the insured paid the mortgage on the property rather than using the payment to rebuild.<sup>130</sup>

Rockford filed a motion for summary judgment contending that the insured's recovery was limited to the actual cash value of the building because the insured had not repaired the building.<sup>131</sup> The insured disputed the amount assigned as actual cash value, and claimed he was entitled to compensatory damages because he struggled to satisfy the mortgage obligations from the loss of rental income due to the fire.<sup>132</sup>

The court denied the insurance company's summary judgment motion.<sup>133</sup>

---

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* The dwelling policy limits were \$193,000. *Id.* The offer made was \$69,874.62. *Id.*

125. *Id.*

126. *Id.* The second adjuster arrived at a figure of \$86,146.66. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* Although the decision does not include the actual date of payment, it was paid almost a year after the date of the fire.

130. *Id.* at 65.

131. *Id.* at 63. The pertinent part of the policy coverage provided that the insured was entitled to replacement costs for the damaged building, subject to the insurer not paying "more than the actual cash value of the damage until actual repair or replacement is completed." *Id.* at 64.

132. *Id.* at 64-65.

133. *Id.* at 63.

The case proceeded to trial, and the insured was awarded a judgment for insurance policy proceeds and consequential damages.<sup>134</sup> On appeal, the court focused on whether the insured could be excused from complying with a policy condition requiring him to rebuild in order to obtain replacement cost coverage.<sup>135</sup> In this case, because Rockford did not make an actual cash value offer to the insured until six months after the fire, the court found that the insured faced a dire predicament in addressing the outstanding mortgage because of the lack of rental income.<sup>136</sup>

The court concluded that “equitable principles” compelled it to excuse the policy condition that the insured rebuild in order to acquire the full dwelling policy limits that exceeded actual cash value of the building.<sup>137</sup> Because the insurer delayed paying the actual cash value to the insured, the court found that the insurer waived the policy condition and affirmed the trial court’s verdict.<sup>138</sup>

The other interesting aspect of this case focused upon the court’s affirmation of the consequential damage award.<sup>139</sup> The court observed that because of Rockford’s failure to pay the actual cash value, the insured continued to incur damages including “repairs, utilities, and property taxes” which arose from the insurer’s alleged breach of the policy.<sup>140</sup>

*B. Alarm Company’s Failure to Notify Store Owner of Alarm Not Being Activated Was Not an “Occurrence” to Trigger Coverage Under General Liability Policy*

An unfortunate set of facts brought about the resolution of a number of interesting insurance coverage questions in *Tri-etch, Inc. v. Cincinnati Insurance Co.*<sup>141</sup> Around midnight, when a liquor store was about to close, a clerk was abducted by a robber, and was tied to a tree at a local park.<sup>142</sup> The robber beat the clerk, and the clerk was not found until early the next morning.<sup>143</sup> Although found alive, the clerk eventually died because of his injuries.<sup>144</sup>

The store possessed a contract with an alarm company, which required the alarm company to notify the store’s owner within thirty minutes if the alarm was not activated at the closing of the store.<sup>145</sup> The clerk’s estate filed a lawsuit

---

134. *Id.* at 64. The actual award was \$124,149.55 for breach of the insurance policy, and \$406,136.58 in consequential damages. *Id.*

135. *Id.* at 65.

136. *Id.* at 66.

137. *Id.* at 66-67.

138. *Id.*

139. *Id.* at 67-68.

140. *Id.* at 68-69.

141. 909 N.E.2d 997 (Ind. 2009), *reh’g denied*, 2009 Ind. LEXIS 1508 (Ind. Oct. 13, 2009).

142. *Id.* at 999.

143. *Id.*

144. *Id.*

145. *Id.*



against the alarm company by contending that it was negligent when it failed to notify the store's owner that the alarm was not activated.<sup>146</sup> The alarm company possessed a commercial general liability and umbrella policy with Cincinnati Insurance Company.<sup>147</sup> The alarm company also was insured with Scottsdale Insurance Company through an alarm company dealers association policy that included errors and omissions coverage.<sup>148</sup> Scottsdale provided a defense to the alarm company for the estate's lawsuit.<sup>149</sup>

The evidence demonstrated that Cincinnati was not notified of the lawsuit until March of 2004, approximately seven years after the incident.<sup>150</sup> Cincinnati denied coverage by contending that the clerk did not die of an "occurrence" as required by both of its policies, and that the alarm company did not provide timely notice to Cincinnati of the event and lawsuit as required by the policy.<sup>151</sup> Cincinnati also filed a counterclaim for declaratory judgment to assert its defenses.<sup>152</sup>

The litigation addressed a number of issues.<sup>153</sup> Eventually, a trial resulted in a verdict of \$2.5 million in favor of the Estate.<sup>154</sup> Scottsdale tendered its policy limits to the Estate, and the alarm company assigned its rights to coverage under the Cincinnati policies to the Estate.<sup>155</sup> Both the Estate and Cincinnati filed summary judgment motions.<sup>156</sup> The trial court ultimately granted summary judgment to Cincinnati, finding that Cincinnati received late notice of the incident and lawsuit, and that the late notice caused prejudice.<sup>157</sup>

On appeal, the court of appeals reversed, and remanded with instructions that the trial court should enter judgment in favor of the estate.<sup>158</sup> The court of appeals concluded that the incident demonstrated an "occurrence" under the

---

146. *Id.*

147. *Id.*

148. *Id.* The Cincinnati policy did not include errors and omissions coverage. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 1000. Cincinnati also claimed that the umbrella policy excluded coverage for claims based upon the insured's providing of alarm services. *Id.* The Indiana Supreme Court ultimately determined that no coverage existed under the umbrella policy as the clerk's death was due to the alleged failure of the alarm company to provide an alarm service. *Id.* at 1004.

152. *Id.* at 1000.

153. The Indiana Supreme Court addressed the application of a contractual one-year limitation on actions. *Young v. Tri-etch, Inc.*, 790 N.E.2d 456 (Ind. 2003). The Indiana Court of Appeals also addressed Cincinnati's attempt to intervene in the underlying lawsuit. *Cincinnati Ins. Co. v. Young*, 852 N.E.2d 8 (Ind. Ct. App. 2006).

154. *Tri-etch, Inc.*, 909 N.E.2d at 999.

155. *Id.* Scottsdale also countersued against Cincinnati to recover a portion of its defense costs. *Id.* at 1000.

156. *Id.*

157. *Id.*

158. *Id.* The Indiana Court of Appeals also remanded that summary judgment be entered in favor of Scottsdale on its claim. *Id.*

policy, and that even if Cincinnati received late notice of the incident and lawsuit, it was not prejudiced because it denied coverage to the alarm company on other coverage grounds.<sup>159</sup> The Indiana Supreme Court granted transfer.<sup>160</sup>

In addressing the "occurrence"<sup>161</sup> issue, the supreme court determined that the alarm company's failure was not an "accident," but represented a professional "error" which was not covered under a general liability policy.<sup>162</sup> In supporting its decision, the court observed:

[The alarm company's] failure was just such an "error or omission," not an "accident," and for that reason it is not an "occurrence" covered by Cincinnati's [commercial general liability] and umbrella policies. The [commercial general liability] policy does not guarantee the quality of work or products of its insureds. To the extent [the alarm company] had a duty to [the clerk], it arose from its contract with [the clerk's] employer. This may give rise to tort liability. . . . But it does not convert a failure to meet a standard of care under a contractually assumed duty into an "accident."<sup>163</sup>

With respect to the late notice defense, the supreme court reversed the court of appeals' decision, which had determined that Cincinnati waived the late notice defense when it denied coverage by asserting the lack of "occurrence" defense.<sup>164</sup> The supreme court specifically found that an insurer may deny coverage on other grounds while retaining its ability to assert a late notice defense:

We do not agree that an insurer's denial of coverage on other grounds as a matter of law rebuts the presumption of prejudice from late notice existing under [*Miller v. Dilts*, 463 N.E.2d 257 (Ind. Ct. App. 1984)]. There is no reason why an insurer should be required to forego a notice requirement simply because it has other valid defenses to coverage. If there is no prejudice to the insurer from lack of notice, the absence of prejudice does not arise from the insurer's taking the position that it also has other valid defenses to coverage.<sup>165</sup>

*Tri-etch* helped firmly establish the scope of coverage for a commercial general liability policy for professional activities. *Tri-etch* also established that an insurer may raise multiple coverage defenses rather than being required to choose one defense and abandon all others.

---

159. *Id.*

160. *Id.* at 1001.

161. "Occurrence" was defined to be "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.*

162. *Id.*

163. *Id.* (internal citation omitted).

164. *Id.* at 1005.

165. *Id.*



*C. Contractor May Be Entitled to Commercial General Liability Insurance for Faulty Workmanship if It Causes Damage to Portions of Building Not Part of a Contractor's Scope of Work*

Indiana has decided a number of cases where the question focuses on whether a commercial general liability insurance policy provides coverage to a contractor for claims of faulty workmanship.<sup>166</sup> These cases have established a general rule that a commercial general liability policy “does not cover an accident of faulty workmanship but rather faulty workmanship which causes an accident.”<sup>167</sup> In *T.R. Bulger, Inc. v. Indiana Insurance Co.*,<sup>168</sup> the court addressed a slight factual variation that clarified the scope of coverage for a faulty workmanship claim.<sup>169</sup>

As a home was being built, the owners hired a contractor to install a heating and air conditioning system.<sup>170</sup> As part of the installation, a large amount of piping was spread throughout the home.<sup>171</sup> Near the end of construction of the home, a dispute arose between the homeowners and the contractor, which prompted the contractor to leave the home before construction was complete.<sup>172</sup> When the homeowners activated the heating system, leaks existing in the piping resulted in water damage to other parts of the constructed home.<sup>173</sup> As a result, the homeowners sued the contractor who filed a counterclaim to recover payment for services rendered.<sup>174</sup>

The contractor sought coverage under his commercial general liability insurance policy for the homeowner's lawsuit.<sup>175</sup> The insurance company contended that no coverage existed for the alleged faulty workmanship of the contractor based upon policy definitions and exclusions.<sup>176</sup> Both the insurer and contractor filed declaratory judgment actions.<sup>177</sup> The trial court granted the insurer's motion for summary judgment by finding that the insured's faulty workmanship was “the efficient and predominant cause” of the homeowner's

---

166. See *Amerisure, Inc. v. Wurster Constr. Co.*, 818 N.E.2d 998, 1004 (Ind. Ct. App. 2004); *Jim Barna Log Sys. Midwest, Inc. v. General Cas. Ins. Co.*, 791 N.E.2d 816, 824 (Ind. Ct. App. 2003); *R.N. Thompson & Assocs., Inc. v. Monroe Guar. Ins. Co.* 686 N.E.2d 160, 165 (Ind. Ct. App. 1997).

167. *Ind. Ins. Co. v. DeZutti*, 408 N.E.2d 1275, 1279 (Ind. 1980) (citing *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788, 796 (N.J. 1979)).

168. 901 N.E.2d 1110 (Ind. Ct. App. 2009).

169. *Id.* at 1114-15.

170. *Id.* at 1112.

171. *Id.*

172. *Id.*

173. *Id.* at 1116.

174. *Id.* at 1112.

175. *Id.* at 1112-13.

176. *Id.* at 1113. Specifically, the insurer contended that there was no “property damage” as defined by the policy, and that exclusions for damage to the insured's work applied. *Id.*

177. *Id.*

damages such that no coverage existed under the commercial general liability policy.<sup>178</sup>

The court of appeals reversed the summary judgment granted to the insurer, finding that disputed factual questions existed.<sup>179</sup> The court distinguished the present case from earlier “faulty workmanship” cases by observing that, in this case, there was evidence that the contractor’s alleged faulty workmanship had produced damages other than damages to the contractor’s work.<sup>180</sup> Specifically, the alleged faulty installation of the piping had caused damage to the other portions of the house that were not part of the contractor’s work.<sup>181</sup> As a result, the insurer was not entitled to a judgment as a matter of law that no coverage existed.<sup>182</sup>

Insurance law practitioners should note the factual distinction that exists in *Bulger* that separates it from earlier “faulty workmanship” cases. In the earlier cases, the insured was the builder of or general contractor in charge of building the entire home.<sup>183</sup> In *Bulger*, the insured contractor’s work was only the installation of the heating and air conditioning system. Thus, the contractor’s alleged faulty workmanship affected other parts of the home outside the scope of the contractor’s work, which constituted “property damage” under the policy. This distinction is important in determining whether coverage under a commercial general liability policy exists for a faulty workmanship claim.

*D. Insured’s Failure to Give Timely Notice of Covered Incident Excused the Insurer from Paying for Insured’s Defense Costs Incurred Before Notice Was Given to Insurer*

In *Dreaded, Inc. v. St. Paul Guardian Insurance Co.*,<sup>184</sup> the Indiana Supreme Court addressed a situation where an insured sought about three years’ worth of attorney defense and investigation costs on an environmental claim before notice was given to the insurer.<sup>185</sup> The insured received a letter from the Indiana Department of Environmental Management concerning a possible soil contamination at the insured’s former business location.<sup>186</sup> The insured hired its own attorney and engaged its own experts to address the alleged soil

---

178. *Id.* at 1114.

179. *Id.* at 1116.

180. *Id.* at 1115-16.

181. *Id.*

182. *Id.* at 1116.

183. See *supra* note 166. During this survey period, the case of *Sheehan Construction Co. v. Continental Casualty Co.*, 908 N.E.2d 305 (Ind. Ct. App. 2009), *trans. granted, opinion vacated*, 2010 LEXIS 57 (Ind. Jan. 14, 2010), addressed a similar fact situation and confirmed the general rule that claims to repair or replace faulty workmanship of an insured are not covered under a commercial general liability insurance policy.

184. 904 N.E.2d 1267 (Ind. 2009).

185. *Id.* at 1268.

186. *Id.* at 1268-69.



contamination.<sup>187</sup> Three years later, it notified its commercial general liability insurer of the letter from the governmental agency, and requested that the insurer pay costs associated with its investigation and defense.<sup>188</sup>

The insurer agreed to assume the defense of the insured from the point of receiving notice of the matter.<sup>189</sup> But the insurer refused to reimburse the insured for the defense and investigation costs incurred before notice was given to the insurer.<sup>190</sup> The insurer relied on policy provisions that required the insured to give notice of a covered incident and not to assume any financial obligations in the investigation or defense without the insurer's consent.<sup>191</sup>

The insured filed a breach of contract action against the insurer.<sup>192</sup> Both the insurer and the insured sought summary judgment.<sup>193</sup> The trial court granted the insurer's motion, concluding that the policy required the insured to give notice, and that the insured gave unreasonably late notice to the insurer of the incident.<sup>194</sup> Furthermore, the trial court rejected the insured's argument that even notice was late, the insurer was required to show prejudice because of the delay before denying coverage.<sup>195</sup> The court of appeals reversed the trial court, concluding that even though the insured supplied late notice, a question of fact existed whether the insurer was prejudiced.<sup>196</sup>

The Indiana Supreme Court reversed the court of appeals, and affirmed the trial court's grant of summary judgment to the insurer.<sup>197</sup> In so doing, the court explained important principals to address the late notice defense on insurance coverage matters. First, the court determined that the "notice" provision of an insurance policy is a condition precedent that the insured must satisfy before any insurance coverage obligation exists for the insurance company.<sup>198</sup> The court explained the importance of the notice provision:

[A]n insurer cannot defend a claim of which it has no knowledge. The function of a notice requirement is to supply basic information to permit an insurer to defend a claim. The insurer's duty to defend simply does not arise until it receives the foundational information designated in the notice requirement. Until an insurer receives such enabling information, it cannot be held accountable for breaching this duty.<sup>199</sup>

---

187. *Id.* at 1269.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 1271.

192. *Id.* at 1269.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 1273.

198. *Id.* at 1271 (citing *Miller v. Dilts*, 463 N.E.2d 257, 266 (Ind. 1984)).

199. *Id.* at 1273.

Additionally, when addressing a failure by an insured to supply timely notice, it is irrelevant to determine if the insurer sustained prejudice from the late notice.<sup>200</sup> Instead, in addressing the late notice question, courts should only focus upon whether the insurer received the proper notice.<sup>201</sup> Whether an insurer was prejudiced simply does not matter.<sup>202</sup>

*Dreaded* provides excellent assistance to insurance coverage practitioners in determining how to address the late notice provision of a policy. The focus has been narrowed to when proper notice was received and whether the timing of that notice was reasonable.<sup>203</sup>

*E. Court Concludes That Claimant's Multiple Injuries Were Continuing Such That No New "Occurrence" Existed to Trigger Coverage Under Multiple Policies*

*Quanta Indemnity Co. v. Davis Homes, LLC*<sup>204</sup> offers an interesting situation involving a claim for a continuing personal injury and the applicability of multiple insurance policies.<sup>205</sup> In 2002, a homeowner contended that he sustained a brain stem injury from an electric shock when he used a dryer in his home.<sup>206</sup> As a result, he brought a personal injury lawsuit against the builder of the home and other contractors.<sup>207</sup> At the time of the incident, North American Specialty Insurance Company insured the builder, and the builder tendered the lawsuit to North American for coverage.<sup>208</sup> North American subsequently provided the builder with a defense for the lawsuit.<sup>209</sup>

Approximately three years later, while the homeowner's lawsuit against the builder was ongoing, the homeowner committed suicide, allegedly because of the depression sustained from the shock injury.<sup>210</sup> The homeowner's wife amended the complaint against the builder to allege a claim for wrongful death.<sup>211</sup> At this time, the builder had liability coverage with a different insurance company, Quanta Indemnity Company, and submitted a request for insurance coverage

---

200. *Id.*

201. *Id.*

202. *Id.*

203. The decision of *Miller v. Dilts*, 463 N.E.2d 257 (Ind. 1984), provides an excellent analysis of the late notice defense: in this case, the court found that a delay of six months was unreasonable and demonstrated "presumed prejudice" to the insurer.

204. 606 F. Supp. 2d 941 (S.D. Ind. 2009).

205. *Id.* at 942.

206. *Id.* at 943.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* The homeowner utilized testimony from a physician who opined that the electrical shock produced various psychological conditions that caused the homeowner to commit suicide.  
*Id.*

211. *Id.*



under the Quanta policy.<sup>212</sup>

There was no dispute that the homeowner's suicide happened during the Quanta policy period.<sup>213</sup> But Quanta's policy had a number of policy definitions and exclusions which generally provided that any "'continuation, change, or resumption' of 'bodily injury'" within Quanta's policy period that the builder knew about before the period began was excluded from coverage.<sup>214</sup> Because the builder knew of the homeowner's injuries from the earlier shock incident, Quanta denied coverage, contending that the homeowner's suicide was a continuation of the initial shock injury and not a new event to trigger coverage under the Quanta policy.<sup>215</sup>

North American and the homebuilder attempted to argue that the suicide represented a new "occurrence" that happened within Quanta's policy period to trigger coverage.<sup>216</sup> Alternatively, North American argued for the application of a "continuous trigger" approach such that if a claimant's injuries arose over different insurers' policy periods, then each policy would apply.<sup>217</sup> The district court rejected each of these arguments, finding that Quanta's policy unambiguously excluded any coverage for the builder.<sup>218</sup> The court found that the builder knew the homeowner sustained injuries from the shock even if it did not know that the homeowner would eventually commit suicide.<sup>219</sup> As a result, under the Quanta policy, no coverage existed.<sup>220</sup>

*Quanta* presented an interesting coverage question because of the separate events affecting the homeowner and the existence of multiple insurers. In this case, Quanta's policy possessed precise language that permitted the exclusion of coverage for a "known claim."<sup>221</sup>

#### IV. INSURANCE AGENT LIABILITY

The case of *Brennan v. Hall*<sup>222</sup> focused on whether an insurance broker may be liable for providing false answers on an insurance application that the insured

---

212. *Id.*

213. *Id.*

214. *Id.* at 949. There were a number of policy provisions that Quanta relied upon which also established that any "known claim" before the Quanta policy's period of coverage would not be covered. *See, e.g., id.* at 944.

215. *Id.* at 944-45.

216. *Id.*

217. *Id.* at 947 n.5. The "continuous trigger" theory was best discussed in *Indiana Gas Co. v. Aetna Casualty & Surety Co.*, 951 F. Supp. 767, 770-71 (N.D. Ind. 1996), *vacated on other grounds*, 141 F.3d 314 (7th Cir. 1998).

218. *Quanta Indem. Co.*, 606 F. Supp. at 949 & n.6.

219. *Id.* at 948-49.

220. *Id.* at 949.

221. *Id.* at 946-47.

222. 904 N.E.2d 383 (Ind. Ct. App. 2009).

reviewed and signed.<sup>223</sup> A potential insured came to an insurance broker<sup>224</sup> seeking homeowners insurance coverage.<sup>225</sup> During a meeting with the broker, the broker asked the potential insured questions while the broker completed the insurance policy application.<sup>226</sup> One of the application questions asked if the potential insured had any animals or exotic pets.<sup>227</sup> The potential insured told the broker that she had dogs, and the broker asked if they were "vicious."<sup>228</sup> The potential insured said "no," and the broker marked "no" to the question about whether the insured had animals.<sup>229</sup> After reviewing the application, Buckeye State Mutual Insurance Company issued her an insurance policy.<sup>230</sup>

After the policy was issued, one of the insured's dogs bit a child, which prompted the child to bring a lawsuit against the insured.<sup>231</sup> Buckeye denied liability coverage for the child's lawsuit, claiming that the insurance policy was void based upon the insured's material misrepresentation on the application.<sup>232</sup> Buckeye also contended that it never would have issued a policy to the insured if it had known that the owned a Doberman Pinscher.<sup>233</sup>

The insured filed suit against the broker for negligence in acquiring insurance for her.<sup>234</sup> The lawsuit against the broker proceeded to trial, and a jury found that the broker was negligent for failing to properly acquire a policy for the insured.<sup>235</sup> On appeal, the broker contended that he could not have breached a duty to the insured because the insured had the opportunity to review the application for accuracy, and because the insured signed the application with the faulty information.<sup>236</sup>

The appellate court refused to reverse the jury's verdict.<sup>237</sup> In its finding, the court held:

We hold that if [a broker] is negligent in assisting a client complete an insurance application, and such negligence leads to a basis for the

---

223. *Id.* at 387.

224. A "broker" is retained by a client to obtain policies from various insurance companies on behalf of the client. *Id.* at 386 & n.2. An "agent" is affiliated with one insurance company and can only acquire coverage for the client from that single insurer. *See id.*

225. *Id.* at 385.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 385-86.

232. *Id.* at 385.

233. *Id.* at 385-86.

234. *Id.* at 386.

235. *Id.* No damages were awarded to the insured as the underlying child's lawsuit was apparently stayed until the broker negligence suit was decided. *Id.*

236. *Id.* at 387.

237. *Id.* at 389.



insurance company to deny coverage to the applicant and/or revoke the policy, the applicant may seek damages from the [broker], even if the applicant signed or ratified the application after having a chance to review it.<sup>238</sup>

The court also observed that the jury was free to assess comparative fault to the insured, if the evidence warranted, for signing the application with false information.<sup>239</sup>

### CONCLUSION

Indiana courts decided a number of significant cases during the survey period important for practitioners to understand. Courts continue to look closely at the language of insurance contracts,<sup>240</sup> but did not shy away from using their equitable powers to excuse policy conditions.<sup>241</sup>

---

238. *Id.* at 388.

239. *Id.* at 389.

240. *See supra* Part I.D.

241. *See supra* Part III.A.





# DEVELOPMENTS IN INTELLECTUAL PROPERTY LAW

CHRISTOPHER A. BROWN\*

## INTRODUCTION

Over the survey period, intellectual property law changed in a number of important cases and other changes in intellectual property came down. The federal courts and the U.S. Patent and Trademark Office (PTO) have further expounded upon the boundaries of patentable subject matter, and the Supreme Court is set to revisit that issue. Further, a new PTO director is suggesting that some significant changes in the practicalities of prosecution may lead at least to a less-adversarial environment. These and other developments will be of interest to Indiana legal practitioners and others concerned with protection of intellectual property.

### I. *IN RE BILSKI*<sup>1</sup>

The U.S. Court of Appeals for the Federal Circuit in *In re Bilski* reversed or at least substantially curtailed the patentability of business methods affirmed in 1998 in *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*<sup>2</sup> In *State Street*, the Federal Circuit had analyzed a number of opinions interpreting § 101 of the Patent Act in coming to the conclusion that methods of doing business were patentable subject matter.<sup>3</sup> In the words of the *State Street* court, “the transformation of data, representing discrete dollar amounts, by a machine through a series of mathematical calculations into a final share price, constitutes a [patent-eligible invention] because it produces ‘a useful, concrete and tangible result.’”<sup>4</sup> Based on *State Street*, many thousands of patent applications have been filed seeking to protect a variety of methods of doing a variety of tasks.<sup>5</sup>

Ten years later, the Federal Circuit revisited the idea of opening the patent gates to any type of method in *In re Bilski*. *Bilski* pitted inventors of a method of hedging investments against the PTO. The PTO examiner and Board of Patent Appeals and Interferences had held that the inventors’ patent application did not claim subject matter eligible under the statute for patent protection.<sup>6</sup> The inventors argued throughout prosecution at the PTO, and in their appeal to the Federal Circuit, that the statute allowed “processes” to be patented, and that the *State Street* decision and Supreme Court authority that preceded it permitted any

---

\* Partner, Woodard, Emhardt, Moriarty, McNett & Henry LLP, Indianapolis. J.D., *summa cum laude*, 1996, Indiana University School of Law—Indianapolis; past Chair, Indiana State Bar Association, Intellectual Property Section.

1. 545 F.3d 943 (Fed. Cir. 2008), *cert. granted*, 129 S. Ct. 2735 (2009).

2. 149 F.3d 1368 (Fed. Cir. 1998).

3. *Id.* at 1375.

4. *Id.* at 1373.

5. *Bilski*, 545 F.3d at 1004 (Mayer, J., dissenting) (citing information available as of January 2008 from the PTO).

6. *Id.* at 950.

methods to be considered for patent protection.<sup>7</sup>

The inventors sought to patent methods “for managing the consumption risk costs of a commodity sold by a commodity provider at a fixed price” including steps of initiating transactions between the commodity provider and consumers, identifying market participants having a different risk position to those consumers, and initiating transactions between the commodity provider and those market participants so as to balance the risk position.<sup>8</sup> These claims recited ways of manipulating risk and arranging transactions, strictly handling intangible concepts. The claims did not suggest any actual transfer of any commodity, nor any change of a commodity from one state to another.<sup>9</sup>

The PTO examiner rejected the claims under § 101 as “not directed to the technological arts,” because the claimed methods were not performed by a particular device (e.g. a computer) and were directed simply to an “abstract idea” or “mathematical problem without any limitation to a practical application.”<sup>10</sup> The Board questioned the examiner’s rationale, saying that such a “technological arts” test has no legal support, and that a method can still be “patent-eligible subject matter ‘if there is a transformation of physical subject matter from one state to another.’”<sup>11</sup> Nevertheless, the Board agreed with the examiner’s rejection because the claims did not recite a patent-eligible transformation. In the Board’s words, a transformation of “non-physical financial risks and legal liabilities” is not the stuff of which patents are made.<sup>12</sup> The attempt by the inventors to cover all possible ways—human, machine and otherwise—of carrying out the listed steps indicated that an abstract idea was claimed, and abstract ideas are not patentable. The lack of a “useful, concrete and tangible result” formed a further reason for the Board to reject the claims as not proper subject matter for a patent.<sup>13</sup>

The Federal Circuit’s legal analysis began with a review of the statute, which recites four types of subject matter for which patents will be issued: machines, processes, manufactures and compositions of matter.<sup>14</sup> Noting that the issue revolved around the meaning of “process,” and that the statutory definition was unhelpful in its circularity,<sup>15</sup> the court examined Supreme Court decisions holding

---

7. *Id.* at 959-60.

8. *Id.* at 949.

9. *Id.* at 950.

10. *Id.* (quoting *Ex parte Bilski*, No. 2002-2257, 2006 WL 5738364, at \*3 (B.P.A.I. Sept. 26, 2006) (*Board Decision*)).

11. *Id.* (quoting *Board Decision*, at \*42).

12. *Id.* (quoting *Board Decision*, at \*43).

13. *Id.* (quoting *Board Decision*, at \*49-50).

14. 35 U.S.C. § 101 (2006). “Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.” *Id.*

15. *Bilski*, 545 F.3d at 951 & n.3 (“The term ‘process’ means process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material.” (quoting 35 U.S.C. § 100(b) (2006))).



that the legal meaning of “process” in this context was narrower than the standard dictionary definition.<sup>16</sup> Specifically, even though they might fall within a common definition of “process,” such notions as natural laws and phenomena, abstract ideas and mental processes are “fundamental principles” that “are not patentable, as they are the basic tools of scientific and technological work.”<sup>17</sup>

To determine whether subject matter is a potentially-patentable process or a “fundamental principle,” the Federal Circuit turned to *Gottschalk v. Benson*<sup>18</sup> and *Diamond v. Diehr*<sup>19</sup> for guidance on the proper test for the PTO and courts to apply. In *Diehr*, the Supreme Court permitted claims that recited use of a particular equation in a process for treating rubber.<sup>20</sup> The *Bilski* court noted that the claims at issue in *Diehr* did not pre-empt all uses of the particular equation, just those within the rubber-treating process as further defined in the claims.<sup>21</sup> The *Bilski* court noted that in *Benson*, however, the Supreme Court did not permit claims to an algorithm for converting data in one particular format to another format because doing so would withhold from the public all uses of that algorithm.<sup>22</sup> Noting the difficulty in assessing whether all uses of an idea or algorithm would be pre-empted by a claim, and the limited utility of comparing particular fact patterns to those of *Diehr* and *Benson*, the *Bilski* court distilled from these and other cases a “definitive test” for whether a claimed process covers a limited use or the whole field of a fundamental principle.<sup>23</sup>

As announced by the court, a process “is surely patent-eligible under § 101 if: (1) it is tied to a particular machine or apparatus, or (2) it transforms a particular article into a different state or thing.”<sup>24</sup> The connection of the fundamental principle, whether an abstract idea, natural phenomenon, or other such abstraction, to a concrete device or to the change of an item is plainly an indication that uses of the abstraction with a different device or to change a different item (or the same item in a way not claimed) are not pre-empted. Comparing this formulation to the facts in *Diehr*, the court saw the claimed process as using an equation specifically to transform raw rubber into particular

---

16. *Id.* at 951-52.

17. *Id.* at 952 (quoting *Gottschalk v. Benson*, 409 U.S. 63, 67 (1972)).

18. 409 U.S. 63 (1972).

19. 450 U.S. 175 (1981).

20. *Diehr*, 450 U.S. at 188-89.

21. *Bilski*, 545 F.3d at 952-53 (citing *Diehr*, 450 U.S. at 187-88).

22. *Id.* at 953-54 (citing *Benson*, 409 U.S. at 65).

23. *Id.* at 954.

24. *Id.* (citing inter alia *Diehr*, 450 U.S. at 192 (holding that using mathematical formula in “transforming or reducing an article to a different state or thing” is patent-eligible); *Parker v. Flook*, 437 U.S. 584, 589 n.9 (1978) (arguably the Supreme Court “has only recognized a process as within the statutory definition when it either was tied to a particular apparatus or operated to change materials to a ‘different state or thing’”); *Benson*, 409 U.S. at 70 (“Transformation and reduction of an article ‘to a different state or thing’ is the clue to the patentability of a process claim that does not include particular machines.”)).

products, hence the result in *Diehr* of proper subject matter for a patent.<sup>25</sup> The court viewed another case<sup>26</sup> as considering use of a formula to determine an “abnormal condition during an unspecified chemical reaction,” and without limits on the conditions, reactions or devices in question, the claims were not drawn to proper subject matter.<sup>27</sup> After briefly reviewing how the facts of other Supreme Court cases fit the test, the Federal Circuit noted the “difficult case” in *Benson*, which claimed a process operated on a particular device, a computer.<sup>28</sup> Nonetheless, the claims in *Benson* were not to proper subject matter, according to the court, because the device recitation did not provide any meaningful limitation insofar as the algorithm at issue had no other usefulness outside of a computer.<sup>29</sup> Merely reciting the computer, without further context (such as *Diehr*’s vulcanizing process) did not “reduce the pre-emptive footprint” of the claim in *Benson*.<sup>30</sup>

The language used in the test cited above suggests that machine-or-transformation is a *sufficient* condition for patentable subject matter. The Federal Circuit went on to say that it is also a necessary condition, rejecting arguments that other tests may also be used to determine whether a patent claim satisfies § 101.<sup>31</sup> Although the Supreme Court’s *Benson* opinion said “transformation and reduction of an article ‘to a different state or thing’ is *the* clue to the patentability of a process claim that does not include particular machines,”<sup>32</sup> the Federal Circuit noted that statement seemed initially equivocal. Later Supreme Court decisions removed that equivocation, according to the court. Further, the court found no basis to reach beyond the machine-or-transformation test, even while recognizing that future technological developments (or reconsideration by the Supreme Court) could provide changes or alternative tests.<sup>33</sup>

Further, the Federal Circuit viewed Supreme Court precedent to hold that a “fundamental principle” cannot be made patentable by limitation to a field of use, outside of the machine-or-transformation test.<sup>34</sup> Such a pre-emption within an entire field demonstrates that “the claim is not limited to a particular application

---

25. *Id.* at 954-55 (citing *Diehr*, 450 U.S. at 184).

26. *Parker v. Flook*, 437 U.S. 584 (1978).

27. *Bilski*, 545 F.3d at 955 (citing *Flook*, 437 U.S. at 586).

28. *Id.*

29. *Id.*

30. *Id.* (citing *Benson*, 409 U.S. at 71-72).

31. *Id.* at 955-56.

32. *Id.* at 956 (quoting *Benson*, 409 U.S. at 70 (emphasis added)).

33. *Id.* at 956. Note *id.* at 958-59, in which the court calls “inadequate” the prior *Freeman-Walter-Abele* test focusing on whether an algorithm is applied to “physical elements or process steps” (see *In re Freeman*, 573 F.2d 1237 (C.C.P.A. 1978); *In re Walter*, 618 F.2d 758 (C.C.P.A. 1980); and *In re Abele*, 684 F.2d 902 (C.C.P.A. 1982)), and in which the court calls “insufficient” the “useful, concrete, and tangible result” test suggested in *In re Alappat*, 33 F.3d 1526, 1544 (Fed. Cir. 1994) and *State Street Bank & Trust Co. v. Signature Financial Group*, 149 F.3d 1368, 1373 (Fed. Cir. 1998).

34. *Id.* at 957 (citing *Diehr*, 450 U.S. at 191-92).



of the principle.”<sup>35</sup> Accordingly, whether a claimed process is narrowly tailored seems of primary importance to the current Federal Circuit. That narrow tailoring must be presented as a meaningful limitation of the operative steps or solution presented by the claimed process as well. The court asserted that *Diehr* confirmed the proposition that a fundamental principle cannot be made patentable merely by additionally claiming “insignificant postsolution activity.”<sup>36</sup> Mere recitation of a machine or a transformation does not automatically equate to proper subject matter, without an indication that the machine or transformation is an important part of the technological solution or answer provided by the process.

Regarding implementation of the machine-or-transformation test, the Federal Circuit first noted that the “machine” branch of the test was not implicated by the applicants’ claims at issue, and so “elaboration of the precise contours of machine implementation” in satisfaction of the test was left for future decisions.<sup>37</sup> On the “transformation” side of the test, the court noted again that the transformation must be central or important to the claimed process, but focused most on what might be an “article,” the transformation of which would be patent-eligible.<sup>38</sup> Sensibly, a transformation of physical objects or substances will meet the test. Questions remain as to whether “[t]he raw materials of many information-age processes . . . electronic signals and electronically-manipulated data,” or such concepts or intangible items as “legal obligations, organizational relationships, and business risks,” are things for which a transformation will permit patent protection.<sup>39</sup>

The court chose not to depart from its previous “measured approach” on this question.<sup>40</sup> Its *Abele* decision found a general claim reciting “graphically displaying variances of data from average values” not to include patent-eligible subject matter.<sup>41</sup> On the other hand, a more specific claim in which the data was x-ray related data produced by a computed tomography (CT) device recited proper subject matter.<sup>42</sup> According to the court, the particular data in *Abele*, representing particular objects and relationships, was sufficiently changed to permit consideration for patent protection. Limiting the scope of the claim to specific data in a specific context (i.e. representing bones or other tissues) eliminated the possibility of pre-empting all uses of a fundamental principle—graphic display—at issue.<sup>43</sup>

Although transforming data in an appropriately narrow context is patent-eligible, the court reiterated an earlier holding that gathering data is generally not

---

35. *Id.*

36. *Id.*

37. *Id.* at 962.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* (citing *In re Abele*, 684 F.2d 902, 909 (C.C.P.A. 1982)).

42. *Id.* at 962-63.

43. *Id.* (citing *Abele*, 684 F.3d at 908-09).

a transformation of the data or other article(s).<sup>44</sup> The court would also consider gathering data for analysis “insignificant extra-solution activity,” because the solution is apparently the analysis or manipulation of the data.<sup>45</sup> Merely reciting the gathering of data, without a context, device or other explanation of the technique of data gathering, will not make an otherwise ineligible subject matter patent-worthy.

With respect to the patent application before the court, the Federal Circuit considered whether the claims at issue fit the transformation branch of the test, and held they did not.<sup>46</sup> The obligations, risk and relationships identified the claims were not physical items nor were they representative of physical items, and so are not proper “articles” or “things” the transformation of which would be proper subject matter for a patent. In essence, the court required whatever was part of the claimed transformation to be physical or so related to physical object(s) or substance(s) as to represent them.<sup>47</sup> Transformation of intangible items, in the sense that such items are not at least stand-ins for physical “stuff,” is not the “stuff” of which patents are made, according to this court.<sup>48</sup>

The court further considered some of its prior opinions finding claims non-patentable under § 101. In *In re Comiskey*,<sup>49</sup> the court held that a claimed process for arbitration of disputes was not eligible for a patent because it was directed only to a mental process for arbitration, i.e. a fundamental principle. Without a machine or a process to transform physical objects, the arbitration process was not a “process” under the meaning of the patent statutes. The court analogized the present case, characterizing it as “directed to the mental and mathematical process of identifying transactions that would hedge risk.”<sup>50</sup> In *In re Meyer*,<sup>51</sup> the court held claims for “diagnosing the location of a malfunction in an unspecified multi-component system” that included assigning and updating values for each component based on testing the components to be improper for patent protection.<sup>52</sup> Once again, the claims in *Meyer* were deemed to be drawn to a mental process only, and the court analogized the claims in *Bilski*’s application.

Three judges provided separate dissenting opinions totaling seventy-six slip-opinion pages. The dissents express to varying degrees a concern that the

---

44. *Id.* at 963.

45. *Id.*

46. *Id.* at 963-64.

47. *Id.* at 964 (holding that “claim 1 does not involve the transformation of any physical object or substance, or an electronic signal representative of any physical object or substance”).

48. *Id.*

49. 499 F.3d 1365 (Fed. Cir. 2007), *vacated en banc* 554 F.3d 967 (Fed. Cir. 2009). Notably, the *en banc Comiskey* court did not refer to *Bilski* in its discussion of patentable subject matter under 35 U.S.C. § 101 (2006). Certain claims were affirmed as unpatentable because not directed to proper subject matter, and others were remanded to the patent examiner for determination of whether Section 101 was satisfied. 554 F.3d at 981-82.

50. *Bilski*, 545 F.3d at 965.

51. 688 F.2d 789 (C.C.P.A. 1982).

52. *Bilski*, 545 F.3d at 965 (citing *Meyer*, 688 F.2d at 792-93).



“machine-or-transformation” test is too narrow for the technology and innovations of the twenty-first century and beyond. Judge Newman’s dissent suggests that the test, which is necessarily considered without regard to novelty, unobviousness, utility or other tests of the patent law, at least introduces uncertainty as to patentability of methods within the “knowledge economy” and at most eliminates protection for inventions applying “electronic and photonic technologies, as well as other processes that handle data and information in novel ways.”<sup>53</sup> She draws from many of the same Supreme Court decisions used by the majority to reach opposite conclusions, arguing that *Benson* and *Flook* do not support an exclusive machine-or-transformation test.<sup>54</sup> Even returning to an analysis of the English Statute of Monopolies and evolution of protection for processes in U.S. law, Judge Newman comes to the conclusion that § 101 permits protection for any “process invention that is not clearly a ‘fundamental truth, law of nature, or abstract idea.’”<sup>55</sup>

Judge Mayer’s twenty-five-page dissent, however, argues forcefully that the *State Street* case should be overruled, and asserts unequivocally that the patent system aims to “protect and promote advances in science and technology, not ideas about how to structure commercial transactions.”<sup>56</sup> His basic principle is that business methods are not “useful arts” and are thus not within the Constitutional scheme for patent protection.<sup>57</sup> Where the innovative method is “entrepreneurial rather than . . . technological,” in his view, no patent protection is available.<sup>58</sup> The majority did not go far enough, according to Judge Mayer, to categorically repudiate *State Street* and “recalibrate the standards for patent eligibility.”<sup>59</sup>

Judge Rader’s dissent agreed with the principle that the claims at issue are unpatentable as abstract ideas, but expressed concern that the majority opinion “disrupts settled and wise principles of law.”<sup>60</sup> Similar to Judge Newman, Judge Rader was concerned that views and arguments expressed in earlier cases are too limiting for present-day technological conditions. “Process,” in his view, is broadly given in the statute and should not be circumscribed by judge-made limitations.<sup>61</sup>

These dissents agree that “fundamental principles” or “natural laws” cannot be patented, but diverge as to what might fit into those intellectual categories. Judges Newman and Rader would allow a broad understanding of “process” foreclosed by the majority opinion, at least insofar as technology continues to evolve and as Congress has not limited the reach of the statutory term “process.”

---

53. *Id.* at 976-77 (Newman, J., dissenting).

54. *Id.* at 978-80.

55. *Id.* at 997.

56. *Id.* at 998 (Mayer, J., dissenting).

57. *Id.* at 999, 1001-02.

58. *Id.* at 1002-04.

59. *Id.* at 1011.

60. *Id.* (Rader, J., dissenting).

61. *Id.* at 1012-13.

Judge Mayer, on the other hand, seeks a return to a pre-*State Street* time, and considered that the device on which the business method is performed may be patentable, but the commercial nature of the method itself is outside the Constitutional scope. The majority came to the question somewhat from the negative side, defining what is *not* a “fundamental principle,” namely processes tied to a machine or transform a physical article or its representation into a different state or article.

*In re Bilski* is currently under consideration by the U.S. Supreme Court.<sup>62</sup> Several dozen amicus briefs were filed, in testament to the high feelings and wide potential for effect to industries such as the pharmaceutical and software industries. On November 9, 2009, the case was argued to the Court,<sup>63</sup> and so an opinion could be rendered at any time.

In the meantime, however, the Federal Circuit and the USPTO are proceeding to apply the rule in *Bilski* as it stands. In *Prometheus Laboratories, Inc. v. Mayo Collaborative Services*,<sup>64</sup> the Federal Circuit examined a patent claiming methods for establishing proper dosages of drugs used for treating autoimmune diseases. A representative claim defined a method of “optimizing therapeutic efficacy” in treatment of a disorder by using the steps of administering a drug that provides a certain metabolite and determining the level of the metabolite in the patient, where a level of the metabolite below a particular threshold value indicates a need for more drug in subsequent administrations, and a level below another threshold value indicates a need for less drug in subsequent administrations.<sup>65</sup> Mayo had at one time purchased the patented test from Prometheus. But once Mayo stopped buying the test and began using its own method, Prometheus sued for patent infringement. According to the court’s recitation of facts, Mayo’s test assessed the same metabolites as in Prometheus’ claims, but used different threshold levels than those recited in Prometheus’ claims.<sup>66</sup>

In the district court, Prometheus won a summary judgment of infringement, but Mayo won a summary judgment of invalidity based on its argument that Prometheus’ claims did not claim proper subject matter under § 101. In the Federal Circuit’s words, Mayo contended “that the patents impermissibly claim natural phenomena—the correlations between, on the one hand, thiopurine drug metabolite levels and, on the other hand, efficacy and toxicity—and that the claims wholly preempt use of the natural phenomena.”<sup>67</sup> The district court agreed with Mayo, finding that the claims merely recite administering drug and determining metabolite levels, which it considered only data-gathering steps.<sup>68</sup> The final portions of the claims, warning that changes to the dosage were needed,

---

62. *Bilski v. Doll*, 129 S. Ct. 2735 (2009).

63. See Transcript of Oral Argument, *Bilski v. Kappos*, 129 S. Ct. 3735 (No. 08-964), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-964.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-964.pdf).

64. 581 F.3d 1336 (Fed. Cir. 2009).

65. *Id.* at 1340.

66. *Id.*

67. *Id.* at 1340-41.

68. *Id.* at 1341.



formed merely a “mental step” according to the district court. Because the physician can tell that changes should be made from the metabolite levels themselves, according to natural body processes, the district court found that the inventors did not “invent” the method but “merely observed the relationship between these naturally produced metabolites and therapeutic efficacy and toxicity.”<sup>69</sup> The claims pre-empted the use by others of a natural process—the correlation of the particular metabolite and patient condition—and thus could not be proper subject matter for a patent.

The Federal Circuit began its analysis with the statutory language of § 101, repeating its pronouncement in *Bilski* that the statutory definition of “process” is circular.<sup>70</sup> It noted the Supreme Court’s language that proper subject matter is “anything under the sun that is made by man,” as well as the Court’s exceptions to that broad language preventing protection for laws or “manifestations” of nature, natural phenomena or abstract ideas.<sup>71</sup> The line to be drawn in the present case, according to the court, is whether the claims were drawn to a “fundamental principle” or phenomenon or the *application* of such a principle or phenomenon.<sup>72</sup> The court accordingly repeated its *Bilski* test, that methods are patentable if they are either tied to a particular machine or result in a transformation of a particular article.

Beyond that base rule, the court focused further on two additional aspects of its *Bilski* decision. Even if the involvement of a machine or the existence of a transformation has been shown, that involvement or existence must provide “meaningful limits” and must not be “insignificant extra-solution activity.”<sup>73</sup> A step merely meant to gather data is not one that will provide patent-worthiness to an entire method, because such a step is not part of the technical solution the method provides to a problem.<sup>74</sup> Even so, such a step cannot be ignored in the analysis, because “patent eligibility of a claim as a whole should not be based on whether selected limitations constitute patent-eligible subject matter.”<sup>75</sup>

Prometheus argued that its claims included both “machine” connections as well as “transformations” of articles. As to machines, Prometheus took the position that there were machines on which the claimed steps “inextricably rely” by the nature of the steps themselves and insofar as dependent claims recited certain machines.<sup>76</sup> Further, it argued that the term “machine” as used in *Bilski* should be interpreted to mean any type of patentable subject matter, and therefore the connections between its claims and pharmaceutical compositions meant that

---

69. *Id.*

70. *Id.* at 1341-42.

71. *Id.* at 1342 (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 304 (1980)).

72. *Id.*

73. *Id.* at 1342-43.

74. *Id.* at 1343.

75. *Id.* (citing *In re Bilski*, 545 F.3d 943, 958 (2008); *In re Diehr*, 450 U.S. 175, 188 (1981); *Parker v. Flook*, 437 U.S. 584, 594 (1978)).

76. *Id.*

the claims were sufficiently connected to particular matter.<sup>77</sup> The transformations Prometheus asserted were a transformation of the patients biochemistry through administering a drug, the transformation of a bodily sample in determining metabolite levels, and transformation of those levels into a “warning . . . to alter the dosage.”<sup>78</sup> The court considered three potential “transformations” Prometheus argued were present in its claims and satisfied the *Bilski* test.

The court did not consider whether the claims met the “machine” prong of the *Bilski* test because it agreed that the claims recited a proper transformation, and therefore met that prong of the test.<sup>79</sup> That “transformation is of the human body following administration of a drug and the various chemical and physical changes of the drug’s metabolites that enable their concentrations to be determined.”<sup>80</sup> The consideration of the human body as an “article” the transformation of which would allow a claimed method to meet the *Bilski* test is clearly enunciated by the Federal Circuit. The court gave the broad principle that “methods of treatment . . . are always transformative when a defined group of drugs is administered to the body to ameliorate the effects of an undesired condition.”<sup>81</sup> The administration of a drug and its transformation in the body—and transformation of the body’s chemistry by adding a metabolite—to combat disease is the very purpose of the claimed subject matter. The transformation and its centrality to the overall claim is what makes the claim patent-eligible.

The court also agreed that the determination of metabolite levels from samples taken from patients is also sufficiently transformative. The opinion noted that these levels could not be found by “mere inspection,” but required “[s]ome form of manipulation” in order to come to a measurement.<sup>82</sup> Simply looking and seeing a result is not a “transformation” that will make a method patent-eligible. Taking a sample and performing an operation on it so as to be able to tell some characteristic about it, however, will constitute a proper transformation. It would appear that court believes that the particular context—the machine or particular conditions or articles used in that operation—will permit the claim to meet the transformation test. The analysis of the samples is not merely data-gathering, as Mayo argued.<sup>83</sup> Rather, the court found that analysis to be central to the claim because it performed a “significant” role in the claimed method of treatment.<sup>84</sup> The analysis of the samples is what permits the last step of the claim to be performed, and on that basis the court finds

---

77. *Id.*

78. *Id.* at 1343-44.

79. *Id.* at 1345-46.

80. *Id.* at 1346.

81. *Id.* Notably, in the third footnote, the court distinguished Justice Breyer’s dissent from a dismissal of certiorari in *Laboratory Corp. of America Holdings v. Metabolite Laboratories, Inc.*, 548 U.S. 124 (2006), the reasoning of which the lower court in *Prometheus* found persuasive. *Prometheus*, 581 F.3d at 1346 n.3.

82. *Id.* at 1347.

83. *Id.*

84. *Id.* at 1347-48.



the analysis step to be part of the solution, and not “insignificant extra-solution activity.” By “sufficiently confin[ing] the patent monopoly,” the administration and analysis steps permitted the claim to satisfy the *Bilski* test.<sup>85</sup>

The court noted that there were “mental steps” included in “wherein” clauses of the claims at issue, but held that “a subsequent mental step does not, by itself, negate the transformative nature of the prior steps.”<sup>86</sup> That is, the mere presence of a mental step or algorithm does not defeat the patentability of methods that meet the machine-or-transformation test in one or more other steps. It is not clear why the court chose to include the terms “subsequent” and “prior” in its holding, and this author sees no reason why the temporal positioning of a mental step or algorithm with respect to other method steps should be controlling.

*Prometheus* can be seen as a confirmation that *Bilski* is a refutation of the idea that a method addressing intangibles such as legal relations or financial obligations can be patented. Broadly speaking, both cases considered a method of “treatment” or addressing a problem. In *Bilski*, the problem or “disease” centered around risk incurred by one party and the method claimed was how to relieve or address that disease. Additionally, it would appear that the consideration or analysis of the risk in the application’s claims could be undertaken by human thought or examination without specialized devices. *Prometheus*, on the other hand, specified the tangible body and its chemistry or disease condition as the context of the claims, and provided a transformation that had to be viewed through technical means rather than direct human observation. These features satisfied the court that a resulting patent would not wholly preempt use of a “fundamental principle.”

## II. CHANGE AT THE U.S. PATENT AND TRADEMARK OFFICE

Much has been written and argued concerning proposed rule changes promulgated by the PTO concerning continuing application practice and numbers of claims permitted in applications.<sup>87</sup> The proposed rules, which limited filing of continuing applications and requests for continued examination and forced applicants to provide a substantial amount of examination information for applications in which more than five independent claims or twenty-five total claims were filed, were challenged by the pharmaceutical company GlaxoSmithKline and an independent inventor in U.S. District Court for the Eastern District of Virginia. The District Court struck down these rules as outside of the PTO’s authority,<sup>88</sup> and the PTO appealed to the Federal Circuit.

---

85. *Id.* (quoting *In re Bilski*, 545 F.3d 943, 962 (Fed. Cir. 2008)).

86. *Id.* at 1348.

87. See, e.g., Christopher A. Brown, *Survey of Developments in Intellectual Property Law*, 40 IND. L. REV. 987, 987-92 (2007). Also note rule changes relating to appeal and interference practice cited in Christopher A. Brown, *Recent Developments in Intellectual Property Law*, 38 IND. L. REV. 1181, 1181-96 (2005).

88. See *Tafas v. Dudas*, 541 F. Supp. 2d 805, 807 (E.D. Va. 2008), *appeal dismissed*, 586 F.3d 1369 (Fed. Cir. 2009) (en banc).



Before the Federal Circuit issued an opinion, however, the Obama Administration appointed a new Under Secretary of Commerce for Intellectual Property and Director of the PTO, David Kappos. Confirmed by the Senate on August 7, 2009, Kappos' background is as an electrical and computer engineer and intellectual property lawyer with IBM. He has served on the boards of the American Intellectual Property Law Association (AIPLA), the Intellectual Property Owners Association, and the International Intellectual Property Society, and he has served as Vice President of the Intellectual Property Owners Association.<sup>89</sup>

Among the other issues facing the new Director was how to handle the continuation and claim rules and the lawsuit with appeal they had spawned. To the delight of patent prosecutors nationwide, the PTO under Kappos has issued a new final rule rescinding the proposed regulations.<sup>90</sup> Concurrently, the PTO and GlaxoSmithKline moved to dismiss the pending appeal and to vacate the lower court's decision striking down the rules, while another party (Tafas) joined the motion to dismiss but objected to vacatur. In *Tafas v. Kappos*,<sup>91</sup> the Federal Circuit dismissed the appeal but did not vacate the district court's decision.<sup>92</sup>

The end result is that the rules and policies governing continuations and required information to accompany patent applications will remain as they have been, with the previously proposed rules enjoined per the district court's holding. Continuation applications may be freely filed, with the statutory requirements of 35 U.S.C. § 120 governing whether such applications are entitled to priority from the earlier-filed applications.<sup>93</sup> No ab initio requirement for analysis of claims, searching for or analyzing references exists regardless of how many claims are filed. The PTO may still request information and handle continuation applications as appropriate under existing rules, and practical considerations will still govern or affect how applicants prepare and prosecute their applications. The legal burdens of the erstwhile rules, however, are no longer at issue.

Director Kappos has also signaled some additional changes in PTO practice that may be considered cultural rather than legal. The PTO naturally has something of an adversarial role to play with respect to patent applications, insofar as it is the examiners' principle task to ask hard questions about patent applications and act as a filter for those not entitled to protection. Over the past several years, it has appeared to many (including the author) that the PTO had taken that adversarial position to an extreme, taking and holding positions rejecting applications of questionable merit. The desire to make and maintain rejections arose, it is believed, from criticisms of the PTO concerning numbers

---

89. President Obama Nominates David Kappos as Patent and Trademark Director, <http://www.uspto.gov/main/homepagenews/2009jun19.htm> (last visited June 5, 2010).

90. Changes to Practice for Continued Examination Filings, Patent Applications Containing Patentably Indistinct Claims, and Examination of Claims in Patent Applications, 74 Fed. Reg. 52686 (Oct. 14, 2009) (to be codified at 37 C.F.R. pt. 1).

91. 586 F.3d 1369 (Fed. Cir. 2009).

92. *Id.* at 1371.

93. 35 U.S.C. § 120 (2006).



of patents held invalid in court proceedings, and from resulting increased review of examiners' allowances of applications and negative incentives to examiners where an allowance was deemed to be improper. Rather than recommending allowance and have his or her performance review substantially affected if the recommendation was rejected, an examiner would find it much safer simply to continue to reject an application, with little or no risk to him or her from an overturning of the rejection on appeal.

The new word from the new Director is that quality assurance in the PTO is a function of not only proper rejections, but also proper allowances. In Kappos' words, "patent quality does not equal rejection. In some cases this requires us to reject all the claims when no patentable subject matter has been presented. . . . In other cases this means granting broad claims when they present allowable subject matter."<sup>94</sup> To reach proper results, Kappos is encouraging both examiners and applicants to "share the responsibility" to "expeditiously identify and resolve issues of patentability . . . to find the patentable subject matter and get it clearly expressed in claims that can be allowed."<sup>95</sup> Early engagement between examiners and applicants, as in proposals for early interviews and for performance credit for examiners for interviews, is a clear goal for Director Kappos going forward.

These and other proposals from the Director are intended to have a positive effect on the backlog of cases before the PTO. Certainly any effort on the part of examiners and applicants to work together to find patentable subject matter in an application and move the application more quickly to allowance will enable average pendency of applications to be reduced.

### III. REVIEW OF WRITTEN DESCRIPTION REQUIREMENT

On August 21, 2009, the Federal Circuit issued its grant of a motion for *en banc* review in *Ariad Pharmaceuticals, Inc. v. Eli Lilly & Co.*<sup>96</sup> The court gave two particular additional questions for briefing: (1) whether 35 U.S.C. § 112, paragraph 1 contains a written description requirement that is separate from enablement, and if so, (2) what the scope and purpose of the written description requirement is. The order vacated an earlier appellate opinion in the case,<sup>97</sup> and set the stage for consideration of a fundamental question of patent law.

It has been black-letter law since at least 1952 that three basic requirements exist for the disclosure in a patent application. For patent claims to be properly supported, the specification in the patent must

contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or

---

94. See PatentlyO, <http://www.patentlyo.com/patent/2009/08/director-kappos-patent-quality-equals-granting-those-claims-the-applicant-is-entitled-to-under-our-laws.html> (Aug. 25, 2009, 8:00).

95. *Id.*

96. 595 F.3d 1329 (Fed. Cir. 2009) (*en banc*).

97. 560 F.3d 1366 (Fed. Cir. 2009).

with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.<sup>98</sup>

This language is parsed into “written description,” “enablement,” and “best mode” requirements, each of which have separate considerations even if they might overlap significantly in particular situations. The written description requirement has been deemed a test of the inventor’s knowledge or state of mind. That is, the inventor was considered to have had in mind all of the material stated in the application and shown in the drawings, and conversely was considered not to have invented anything outside of the document. Accordingly, the inventor could not obtain protection for subject matter not particularly identified in his or her application. The enablement requirement is thought of as the test for whether the inventor has met his end of the patent bargain, i.e. that he or she has given a better technological way or solution to the public in exchange for the exclusionary rights embodied in a patent. The best mode requirement is a policy that the patent bargain should include not just any way to accomplish the inventor’s solution, but the best way in the inventor’s mind to accomplish the solution.

This tripartite way of reviewing a patent disclosure to ensure that the public gets sufficient technological information in a patent has been questioned periodically but not seriously changed at least since the enactment of the current statute in 1952. The *Ariad* case now is poised not only to consider whether the current system is the correct analytical method but also potentially to create new frameworks for considering the sufficiency of a patent disclosure. Further, because the court is considering these questions *en banc*, there is some potential for reconsideration of a number of cases that have addressed the interconnected questions of written description, enablement and best mode. It is certainly possible that the resulting opinion will simply confirm the existing legal theories regarding patent specifications, if for no other reason than to maintain certainty and consistency that have existed in this area of the law over past decades. Nonetheless, a decision in this case is eagerly awaited and has the potential to recast a significant portion of the patent law.

#### IV. SECTION 271(F) DOES NOT APPLY TO PATENTED METHODS

The Federal Circuit limited the reach of a part of the infringement section in *Cardiac Pacemakers, Inc. v. St. Jude Medical, Inc.*<sup>99</sup> In this opinion, the court considered a rulings from the Southern District of Indiana concerning claim invalidity and damages.<sup>100</sup> Among other decisions taken by the appellate panel, a particular question as to the applicability of 35 U.S.C. § 271 to methods was

---

98. 35 U.S.C. § 112, ¶ 1 (2006).

99. 576 F.3d 1348 (Fed. Cir. 2009) (*en banc*).

100. *Cardiac Pacemakers, Inc. v. St. Jude Med., Inc.*, 483 F. Supp. 2d 734 (S.D. Ind. 2007); *Cardiac Pacemakers, Inc. v. St. Jude Med., Inc.*, 418 F. Supp. 2d 1021 (S.D. Ind. 2006).



considered *en banc*, resulting in a reversal of the trial court on that question.<sup>101</sup>

In the pertinent section of the opinion, the court began by tracing the development of the law of infringement in cases in which an infringement is “completed” outside of the United States.<sup>102</sup> In *Deepsouth Packing Co. v. Laitram Corp.*,<sup>103</sup> the Supreme Court determined that sending parts of a patented device abroad for assembly there was not an infringement. Section 271(f) of the Patent Act<sup>104</sup> was created to obviate the *Deepsouth* decision. In summary, it provides that one who sends to another country all or a “substantial portion” of components in an uncombined state, where combining them would infringe a U.S. patent, or who sends to another country a piece especially made for the patented invention and intends that it go into the patented invention, is an infringer.

The court then traced its consideration of § 271(f) through several opinions.<sup>105</sup> It noted that several cases reviewing the reach of the section considered both patent claims to devices and methods, and so were not entirely on point with respect to the present case, in which methods were the only claims at issue. However, in 2006 a panel of the court firmly faced a case of whether exporting a chemical catalyst for use in a claimed method could be infringement under § 271(f). In *Union Carbide Chemicals & Plastics Technology Corp. v. Shell Oil Co.*,<sup>106</sup> the court found that the catalyst was a “component of a patented invention” pursuant to the statute, and that its earlier decisions at least implied that the “patented invention” referred to in the statute could be a method.<sup>107</sup> The *Cardiac Pacemakers* court also noted an intervening Supreme Court decision in *AT&T Corp. v. Microsoft Corp.*,<sup>108</sup> which it characterized as sending “a clear message that the territorial limits of patents should not be lightly breached.”<sup>109</sup>

The court’s treatment in the present analysis focused on what a “component” is, and finding that while method claims can have “components,” they are steps or actions and not tangible items like chemicals or device parts.<sup>110</sup> The argument that the device or item that performs a method (or step of that method) is a component of the method was dispatched by the court through examining other parts of § 271 and noting its distinct notation of a component of a machine or product with “material or apparatus for use in practicing a patented process.”<sup>111</sup> Further, the use of the verb “supply” in § 271(f), in the court’s view, suggests a

---

101. *Cardiac Pacemakers, Inc. v. St. Jude Med., Inc.*, 576 F.3d 1348, 1364 (Fed. Cir. 2009).

102. *Id.*

103. 406 U.S. 518, 527, 531 (1972).

104. 35 U.S.C. § 271(f) (2006).

105. *Cardiac Pacemakers*, 576 F.3d at 1360-62.

106. 425 F.3d 1366 (Fed. Cir. 2005).

107. *Id.* at 1378.

108. 550 U.S. 437 (2007).

109. *Cardiac Pacemakers*, 576 F.3d at 1361-62.

110. *Id.* at 1363-64.

111. *Id.* at 1363-64 (quoting 35 U.S.C. § 271(c) (2006)).

transfer of a tangible item of some kind, not an intangible action or step.<sup>112</sup> The court forestalled the argument that its view of § 271(f) did not accord with the Congressional purpose of overruling the *Deepsouth* opinion, saying that *Deepsouth* concerned machines only, and so overruling that case did not require a statute that reached methods as well as devices.<sup>113</sup> Consequently, the court rejected its prior *Union Carbide* holding and determined that the § 271(f) could not apply to patented methods.<sup>114</sup> No infringement could lie for infringement of the method claim at issue for exported products.

#### V. NEW VIEWS ON FRAUD ON THE TRADEMARK OFFICE<sup>115</sup>

On the trademark side of the PTO, one principal development of the past year is in the treatment and analysis of allegations of fraud in acquiring trademark or service mark registrations. To this point, any error or irregularity in an application or other papers related to a registration could result in an opponent or the PTO raising the question of fraud on the Office, with the penalty of loss of the registration if proven.

As one example, note the case of *Medinol Ltd. v. Neuro Vasx, Inc.*,<sup>116</sup> which considered a mark registered for two types of goods but used by the registrant on only one of those types. The registrant argued that its erroneous description of goods in its application had been merely an oversight.<sup>117</sup> The opponent took the position that if the registrant was allowed to keep its registration, the effect would be a lack of incentive to the registrant and other applicants to be honest with the PTO. Any false or fraudulent inclusion of goods in an application could simply be argued later to be a mistake, with the result being deletion of the mistake and effectively no penalty for the registrant.<sup>118</sup> The Board cancelled the registration in its entirety, holding that knowledge that a mark is not being used on listed goods, or reckless disregard for the facts, is sufficient to find fraud in the procurement of a registration.<sup>119</sup> Further, the Board held that it is not the registrant's subjective state of mind that is at issue, but the "objective manifestation of that intent."<sup>120</sup> The manifestation was including too many goods in the application, which the registrant signed, and that manifestation was enough to be considered fraudulent.

Even so, a later case provided a pathway to dealing with such alleged errors or "curing" what the PTO deemed to be fraud. In *Zanella Ltd. v. Nordstrom*,

---

112. *Id.* at 1364.

113. *Id.* at 1364-65.

114. *Id.* at 1365.

115. The author gratefully acknowledges the research and preparation of material in this section by James R. Blaufuss of Woodard, Emhardt, Moriarty, McNett & Henry LLC.

116. 67 U.S.P.Q.2d 1205 (T.T.A.B. 2003) (precedential).

117. *Id.* at 1206-07.

118. *Id.* at 1207.

119. *Id.* at 1209.

120. *Id.*



*Inc.*,<sup>121</sup> the Board viewed correcting a false statement before a challenge to the registration would create a rebuttable presumption of lack of intent to defraud.<sup>122</sup> The registrant had items in its registration that were not in fact being used. Under the *Medinol* standard, whether or not that is subjectively merely a mistake, the presence of the unused goods in a registration would appear to have been deemed fraudulent. Here, however, the registrant effectively corrected the registrations at issue by omitting its items on which the mark was not used from a later declaration of continued use.<sup>123</sup> Doing so prior to a challenge to the registration from another defused the fraud inquiry, giving the registrant the presumption of lack of intent to deceive the USPTO. A genuine issue remained as to registrant's intent, but the registrant had the benefit of the presumption.<sup>124</sup>

The Board has also noted that a false statement that does not affect the PTO's decision on registration is not fraud. In *Kathleen Hiraga v. Sylvester J. Arena*,<sup>125</sup> a fraud had been alleged based on the registrant not having used the mark in commerce at the first use date given in the application. Holding that "the critical question in this case is whether the mark was in use in connection with the identified goods as of the filing date of his use-based application," the Board found no fraud.<sup>126</sup> The first use date was not "material to the Office's decision to approve a mark for publication,"<sup>127</sup> and so could not have resulted in an improper obtaining of a registration.

The beginnings of a change in fraud considerations were seen in *G&W Laboratories, Inc. v. G W Pharma Limited*.<sup>128</sup> In that case, fraud was alleged for registrations that listed goods and services, but it turned out that the registrant had never used the mark with respect to the services. Whereas the cancelled registration in *Medinol* concerned two types of goods in the same class, the Board took the view in *G&W* that applications in more than one class "can be viewed as a series of applications for registration of a mark in connection with goods or services in each class . . . [so that] the filer of such an application is in the same position it would be had it filed several single-class applications instead."<sup>129</sup> Drawing this distinction seems to be an overly legalistic view of registration applications, or perhaps it is an indication that the remedy of cancellation of an entire registration is draconian in some circumstances. The Board's consideration that fraud in one class—i.e. one application—is not necessarily fraud in all classes or applications may be sound logically and from a humanitarian perspective, but an equally logical conclusion would have been to say that the fraud in one application infects closely related applications as well.

---

121. 90 U.S.P.Q.2d 1758 (T.T.A.B. 2009) (not precedential).

122. *Id.* at 1761-62.

123. *Id.* at 1760-61.

124. *Id.* at 1762.

125. 90 U.S.P.Q.2d 1102 (T.T.A.B. 2009) (precedential).

126. *Id.* at 1107-08.

127. *Id.* at 1107.

128. 89 U.S.P.Q.2d 1571 (T.T.A.B. 2009) (precedential).

129. *Id.* at 1574.

In light of that background of recent fraud decisions of the Trademark Trial and Appeal Board, the Federal Circuit's decision on this topic in *In re Bose Corp.*<sup>130</sup> was all the more remarkable. The Board had cancelled a Bose registration on grounds of fraud in a declaration of continued use in support of a renewal of the registration.<sup>131</sup> The declaration alleged continued use of the mark on tape players, which the declarant knew had in fact been discontinued, even though Bose continued to service such products.<sup>132</sup> Although the declarant asserted a belief that Bose's transportation of repaired tape players was proper use of the mark in commerce, the Board found that belief unreasonable and cancelled the registration in its entirety.

The Federal Circuit, however, reversed the ruling of fraud, calling it error for the Board to have made simple negligence the standard for fraud "[b]y equating 'should have known' with a subjective intent."<sup>133</sup> In fact, the court viewed the record as being without substantial evidence that Bose intended to defraud the PTO in its declaration for renewal of the registration. Even if the registration needed some restriction in terms of its list of goods in order to reflect the reality of Bose's commercial situation, fraud was not a part of this calculation.

Nonetheless, the court left open the possibility of coming to the conclusion that fraud had been committed in an appropriate case. Because proof of a registrant's intent to deceive is "rarely available, such intent can be inferred from indirect and circumstantial evidence. But such evidence must still be clear and convincing, and inferences drawn from lesser evidence cannot satisfy the deceptive intent requirement."<sup>134</sup> It also looked at precedent relied on in the *Medinol* case, *Torres v. Cantine Torresella S.r.l.*<sup>135</sup> Although the *Torres* opinion used the language "knows or should know" to characterize its analysis, the facts of that case clearly showed that the registrant made false statements that he knew to be false. The *Bose* court held that the *Medinol* board read *Torres* too broadly, and repeated that a subjective intent to deceive the PTO is an "indispensable element" in the question of fraud.<sup>136</sup>

---

130. 580 F.3d 1240 (Fed. Cir. 2009).

131. *Id.* at 1242 (citing *Bose Corp. v. Hexawave, Inc.*, 88 U.S.P.Q.2d 1332 (T.T.A.B. 2007)).

132. *See id.*

133. *Bose*, 580 F.3d at 1244.

134. *Id.* at 1245 (quoting *Star Scientific, Inc. v. R.J. Reynolds Tobacco Co.*, 537 F.3d 1357, 1366 (Fed. Cir. 2008)).

135. 808 F.2d 46 (Fed. Cir. 1986).

136. *Bose*, 580 F.3d at 1245.



# RECENT DEVELOPMENTS IN MEDICAL MALPRACTICE

STEVEN P. LAMMERS\*

## INTRODUCTION

This Article discusses developments in medical malpractice law in Indiana during the survey period, October 1, 2008 through September 30, 2009 (the "Survey Period").

The Indiana General Assembly did not add to, amend, or repeal any section of Indiana's Medical Malpractice Act (the "Act")<sup>1</sup> in the 2009 Regular and Special Sessions. Therefore, this Article examines the ten published cases decided by the Indiana Court of Appeals and Indiana Supreme Court during the Survey Period.

## I. STATUTE OF LIMITATIONS

Statute of Limitations issues often arise in medical malpractice cases. Generally, in a medical malpractice case:

A claim, whether in contract or tort, may not be brought against a health care provider based upon professional services or health care that was provided or that should have been provided unless the claim is filed within two (2) years after the date of the alleged act, omission, or neglect, except that a minor less than six (6) years of age has until the minor's eighth birthday to file.<sup>2</sup>

However, Indiana's courts have found that in certain circumstances the statute of limitations date may be deferred.<sup>3</sup> For example, plaintiff who cannot reasonably know of the alleged malpractice within the two-year period may institute a claim for relief within two years from the "trigger date."<sup>4</sup> However,

---

\* Attorney, Krieg DeVault LLP, Schererville, Indiana. B.S., *cum laude*, 2003, Miami University (Ohio); J.D., Honors Program, 2006, Valparaiso University School of Law.

1. IND. CODE §§ 34-18-1-1 to -18-2 (2008).

2. *Id.* § 34-18-7-1.

3. *See Herron v. Anigbo*, 897 N.E.2d 444, 449 (Ind. 2008), *reh'g denied*, No. 4S503-0811-CV-594, 2009 Ind. LEXIS 119 (Ind. Feb. 10, 2009).

4. The court defined the "trigger date" before the Survey Period. *See id.* at 454.

[T]he ultimate question becomes the time at which a patient "either (1) knows of the malpractice and resulting injury or (2) learns of facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury."

Although we have sometimes referred to the critical date as the "discovery date," we think a more accurate term is "trigger date," because actual or constructive discovery of the malpractice often postdates the time when these facts are known. Moreover, the trigger date, unlike a typical discovery date applicable to an accrual of a claim, in most circumstances does not start a fixed limitations period. Rather, it is the date on which a fixed deadline becomes activated.

*Id.* at 448-49 (footnote omitted) (quoting *Booth v. Wiley*, 839 N.E.2d 1168, 1172 (Ind. 2005)).

if the “trigger date” is within two years after the alleged malpractice, the plaintiff must exercise reasonable due diligence in order to file before the statute of limitations has run.<sup>5</sup> Reasonable diligence is determined on a case-by-case basis but requires the claimant to pursue the facts to determine if there is a cognizable claim.<sup>6</sup>

#### A. Overton v. Grillo

During the Survey Period, the Indiana Supreme Court decided in *Overton v. Grillo*<sup>7</sup> that the “trigger date” to file a medical malpractice claim occurred when the patient was told by her doctor that she had cancer and not when an attorney informed her of the possibility of a medical malpractice claim.<sup>8</sup>

Christine Overton had a mammogram on July 7, 1999.<sup>9</sup> Dr. Marshall Grillo told Ms. Overton that the mammogram was normal.<sup>10</sup> However, another mammogram performed on October 2, 2000 revealed the presence of a lesion, and an ultrasound performed on the same date revealed cancer.<sup>11</sup> Ms. Overton’s attorney advised her of the possibility of a claim for medical malpractice on October 11, 2001.<sup>12</sup> Ms. Overton testified in a deposition that October 11, 2001 was the first date she had any information to believe she may have a medical malpractice claim against Dr. Grillo.<sup>13</sup> Eight days later, Ms. Overton and her husband filed a medical malpractice lawsuit against Dr. Grillo.<sup>14</sup>

The trial court granted summary judgment in favor of Dr. Grillo on the issue of statute of limitations. The court decided that Ms. Overton had “enough information to lead a reasonably diligent person . . . to [discover]” the possibility of malpractice on October 2, 2000, when she was diagnosed with cancer, and there were nine months remaining under the statute of limitations.<sup>15</sup> In an unpublished opinion, the Indiana Court of Appeals reversed and remanded deciding that there were issues of fact with regard to the statute of limitations period.<sup>16</sup> The Indiana Supreme Court granted transfer to address the statute of limitations issue.<sup>17</sup>

---

5. *Id.* at 449.

6. *Id.*

7. 896 N.E.2d 499 (Ind. 2008), *reh’g denied*, No. 64504-0811-CV-595, 2009 LEXIS 118 (Ind. Feb. 10, 2009).

8. *Id.* at 504.

9. *Id.* at 501.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* (quoting the trial court grant of summary judgment).

16. *Id.* (citing *Overton v. Grillo*, 874 N.E.2d 404 (Ind. Ct. App. 2007), *vacated*, 896 N.E.2d 499 (Ind. 2008)).

17. *Id.* at 502.



The court found that *Boggs v. Tri-State Radiology, Inc.* controlled this case.<sup>18</sup> In *Boggs*, Ms. Boggs underwent a mammogram on her left breast in July 1991.<sup>19</sup> She was told to return in one year. In August 1992 following a second mammogram, Ms. Boggs was diagnosed with breast cancer and subsequently died. Ms. Boggs's husband filed a lawsuit for medical malpractice in July 1994, and the Indiana Supreme Court ultimately held that Ms. Boggs became aware of her injury in August 1992.<sup>20</sup> Thus, the statute of limitations barred Ms. Boggs' July 1994 medical malpractice complaint.<sup>21</sup>

Therefore, Ms. Overton had enough information on October 2, 2000, the date of the second mammogram, to put her on inquiry notice of the possibility of bringing a medical malpractice claim against Dr. Grillo.<sup>22</sup> Thus, the court determined that October 2, 2000 was Ms. Overton's "trigger date."<sup>23</sup> The court next determined that nothing prevented Ms. Overton from filing a medical malpractice complaint in the nine months remaining in the limitations period.<sup>24</sup> The court affirmed the decision of the trial court granting summary judgment in favor of Dr. Grillo.<sup>25</sup>

#### B. Herron v. Anigbo

The Indiana Supreme Court in *Herron v. Anigbo*,<sup>26</sup> again affirmed a trial court's decision granting summary judgment in favor of a physician for a patient's failure to file a claim within the applicable statute of limitations period. In *Herron*, Victor Herron underwent spinal surgery performed by neurosurgeon Dr. Anthony Anigbo on March 6, 2002.<sup>27</sup> Mr. Herron experienced post-surgical problems, including speaking difficulties, infection, and pulmonary difficulties, which required the use of a ventilator for nine months.<sup>28</sup> In June 2003, Mr. Herron presented to another neurosurgeon, Dr. Matthew Hepler, who noted several postoperative complications, some of which could require revision surgery.<sup>29</sup> Then, in November 2003, another physician informed Mr. Herron that his "condition ha[d] deteriorated since the accident, and that a likely cause of the

---

18. *Id.* at 503 (citing *Boggs v. Tri-State Radiology, Inc.*, 730 N.E.2d 692 (Ind. 2000)).

19. *Boggs*, 730 N.E.2d at 694.

20. *Id.* at 699.

21. *Id.* at 695-96.

22. *Overton*, 896 N.E.2d at 504.

23. *Id.*

24. *Id.*

25. *Id.*

26. 897 N.E.2d 444 (Ind. 2008), *reh'g denied*, No. 4S503-0811-CV-594, 2009 Ind. LEXIS 119 (Ind. Feb. 19, 2009).

27. *Id.* at 447. Mr. Herron's spinal surgery came about due to a fall at his home the previous day on March 5, 2002. The fall rendered him a quadriplegic. *Id.*

28. *Id.*

29. *Id.*

deterioration was negligent follow-up care.”<sup>30</sup> On November 11, 2003, Mr. Herron underwent a second spinal surgery along with the application of a halo.<sup>31</sup>

Mr. Herron then filed his medical malpractice complaint against Dr. Anigbo on December 7, 2004, more than two years after the surgery.<sup>32</sup> The complaint accused Dr. Anigbo of “failure to take proper precautions prior to surgery, failure to monitor the patient after surgery, and failure to properly perform the surgery.”<sup>33</sup>

Dr. Anigbo filed a motion for summary judgment in the state court matter, arguing that the two-year occurrence-based statute of limitations barred Mr. Herron’s complaint.<sup>34</sup> The trial court granted summary judgment finding that Mr. Herron knew, or should have known, in the exercise of reasonable diligence of Dr. Anigbo’s malpractice based on Dr. Hepler’s June 2003 report. The trial court reasoned that the remaining nine-months on the statute of limitations gave Mr. Herron a “meaningful opportunity to file his claim before the statute expired in March 2004.”<sup>35</sup> The Indiana Court of Appeals reversed and remanded finding that Mr. Herron did not discover his claim until November 2003, when he was informed of his deteriorated condition.<sup>36</sup> Furthermore, the remaining four months of the statute of limitations did not allow Mr. Herron a meaningful opportunity to file a medical malpractice claim.<sup>37</sup>

In *Herron*, the court noted that the proper procedure in a medical malpractice case when a statute of limitations issue cannot be resolved in summary judgment had not been determined.<sup>38</sup> The court cited *Jacobs v. Manhart*,<sup>39</sup> a previous Indiana Court of Appeals decision, which showed that a hearing may be required to resolve disputed facts and to determine when the trigger date is set.<sup>40</sup> However, the *Herron* court explicitly held that factual issues related to the running of the statute of limitations period, such as the date of when a plaintiff first learns of medical malpractice, are issues to be resolved by the trier of fact.<sup>41</sup>

---

30. *Id.* Dr. Jacquelyn Carter was the physician who informed Mr. Herron that his condition had deteriorated since the spinal surgery.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*; see also IND. CODE § 34-18-74(b) (2008).

35. *Herron*, 897 N.E.2d at 447.

36. *Id.*

37. *Id.* (citing *Herron v. Anigbo*, 866 N.E.2d 842, 846 (Ind. Ct. App. 2007), *vacated*, 897 N.E.2d 444 (Ind. 2008)). Both the trial court and the Indiana Court of Appeals assumed the statute of limitations began to run on the date of Mr. Herron’s initial surgery on March 6, 2002. *Id.* at 447-48.

38. *Id.* at 452.

39. 770 N.E.2d 344 (Ind. Ct. App. 2002).

40. *Herron*, 897 N.E.2d at 452 (citing *Jacobs*, 770 N.E.2d at 352).

41. *Id.* This is the prevailing view in other jurisdictions according to the court. *Id.* (citing *Brin v. S.E.W. Investors*, 902 A.2d 784 (D.C. 2006); *Lipsteuer v. CSX Transp., Inc.*, 37 S.W.3d 732 (Ky. 2000); *Martin v. Arthur*, 3 S.W.3d 684 (Ark. 1999); *Collins v. Pittsburgh Corning Corp.*



Even though the trier of fact resolved factual issues related to the running of the statute of limitations period, the *Herron* court still affirmed the trial court's ruling for summary judgment in favor of Dr. Anigbo.<sup>42</sup> The court decided that even if Mr. Herron did not have enough information to lead a reasonably diligent person to discover a possible claim of medical malpractice until November 2003, four months remained to sue for medical malpractice.<sup>43</sup> Therefore, as a matter of law, this was sufficient time for Mr. Herron to assert a claim.<sup>44</sup> The court hinted that if Mr. Herron had offered evidence to show that he was not reasonably able to consult an attorney within that four month time period, it may very well have decided differently.<sup>45</sup>

### C. *Newkirk v. Bethlehem Woods Nursing and Rehabilitation Center, LLC*

In *Newkirk v. Bethlehem Woods Nursing and Rehabilitation Center, LLC*,<sup>46</sup> a third case decided by the Indiana Supreme Court on statute of limitations during the Survey Period, the court analyzed the interaction of the statute of limitations of Indiana's Wrongful Death Act<sup>47</sup> (the "Wrongful Death Act") and the statute of limitations for the Act.<sup>48</sup> In *Newkirk*, Martha O'Neal was admitted to Bethlehem Woods Nursing and Rehabilitation Center on September 10, 2001 following surgery.<sup>49</sup> On September 22, 2001, Ms. O'Neal was found in a pool of her own blood, and she was then transferred to the hospital.<sup>50</sup> Ms. O'Neal died less than two months later on November 6, 2001.<sup>51</sup>

On October 22, 2003, more than two years after the alleged act or omission of medical malpractice, Ms. O'Neal's estate brought a complaint under the Wrongful Death Act, alleging medical malpractice against Bethlehem.<sup>52</sup> Bethlehem moved for summary judgment arguing that the medical malpractice claim was time-barred because it was not brought within two years of the alleged

---

673 A.2d 159 (Del. 1996); *Pennwalt Corp. v. Nasios*, 550 A.2d 1155 (Md. 1988)).

42. *Id.* at 453.

43. *Id.*

44. *Id.* The court did not decide the trigger date in this case. Instead, it assumed that even if November 2003 was the trigger date, the remaining four months was sufficient time for Mr. Herron to reasonably bring a claim for medical malpractice. *Id.*

45. *Id.* The decision noted that Mr. Herron offered no claim that there was a barrier for him to assert a claim within two years following the March 6, 2002 spinal surgery. *Id.*

46. 898 N.E.2d 299 (Ind. 2008).

47. IND. CODE § 34-23-1-2 to -2-1 (2008 & 2009 Supp.).

48. *Newkirk*, 898 N.E.2d at 300.

49. *Id.*

50. *Id.* The case does not discuss the circumstances surrounding what exactly happened to Ms. O'Neal before she was found in a pool of her own blood. However, it does specifically state that Ms. O'Neal's death was caused by the medical malpractice of Bethlehem. *Id.*

51. *Id.*

52. *Id.*

act or omission of malpractice.<sup>53</sup> The trial court agreed and granted summary judgment in favor of Bethlehem.<sup>54</sup> The Indiana Court of Appeals reversed, finding that the claim arose under the Indiana's Professional Services Statute,<sup>55</sup> because Bethlehem was not a "qualified provider" under the Medical Malpractice Act (MMA) and therefore was not entitled to its protections.<sup>56</sup> Furthermore, the Indiana Court of Appeals held that the estate's claim was filed within the limitations provided by the Wrongful Death Act, and therefore it was timely filed.<sup>57</sup>

The Indiana Supreme Court held that the medical malpractice caused Ms. O'Neal's death and that the medical malpractice claim terminated at her death.<sup>58</sup> The court further held that the wrongful death claim was required to be filed by Ms. O'Neal's personal representative within two years of the occurrence of medical malpractice.<sup>59</sup> Therefore, the court determined that the claim of Ms. O'Neal's estate was time-barred and affirmed the decision of the trial court, granting summary judgment in favor of Bethlehem.<sup>60</sup>

#### D. Eads v. Community Hospital

In *Eads v. Community Hospital*,<sup>61</sup> the Indiana Court of Appeals determined

---

53. *Id.*

54. *Id.*

55. The Indiana Professional Services statute reads:

An action of any kind for damages, whether brought in contract or tort, based upon professional services rendered or which should have been rendered, may not be brought, commenced, or maintained, in any of the courts of Indiana against physicians, dentists, surgeons, hospitals, sanitariums, or others, unless the action is filed within two (2) years from the date of the act, omission, or neglect complained of.

IND. CODE § 34-11-2-3 (2008).

56. *Newkirk*, 898 N.E.2d at 300-02 (citing *Estate of O'Neal ex rel. Newkirk v. Bethlehem Woods Nursing and Rehab. Ctr. LLC*, 878 N.E.2d 303, 314 (Ind. Ct. App. 2007), *aff'd on reh'g*, 887 N.E.2d 1019 (Ind. Ct. App. 2008)).

57. *Id.* (citing *Estate of O'Neal*, 878 N.E.2d at 315).

58. *Id.* at 301.

59. *Id.* at 302. The court determined that Indiana's Professional Services Statute was the applicable statute to determine whether the medical malpractice claim was timely filed because Bethlehem was not a "qualified provider" under the Act. *Id.* at 300. The court determined that the legislature had codified procedures under Indiana's Professional Services Statute to determine statute of limitations issues under these circumstances. *Id.* at 302. The court determined that the failure of the personal representative to bring a claim for medical malpractice within two years of the occurrence of the alleged malpractice made the claim time-barred. *Id.* Although the claim was filed within two years of Ms. O'Neal's death, it was not filed within two years of the occurrence of malpractice. *Id.*

60. *Id.*

61. 909 N.E.2d 1009 (Ind. Ct. App. 2009), *trans. granted, opinion vacated*, No. 45A03-0807-CV-350, 2010 Ind. LEXIS 40 (Ind. Jan. 14, 2010).



that a claim for medical malpractice filed with the Indiana Department of Insurance (IDOI) after the statute of limitations had run was not a continuation of a claim for negligence filed in a state trial court.<sup>62</sup> Therefore, the claim was not timely filed under Indiana's Journey's Account Statute.<sup>63</sup>

On August 15, 2004, Suzanne Eads received treatment at Community Hospital for an ankle injury.<sup>64</sup> Upon discharge from the hospital, Ms. Eads requested a wheelchair to exit the hospital.<sup>65</sup> A hospital employee refused the request and instead told Ms. Eads that "she could leave the [h]ospital on crutches."<sup>66</sup> As Ms. Eads was leaving the hospital, she fell and sustained injuries to her back and left hand.<sup>67</sup>

Instead of filing a proposed complaint with the IDOI, as is the typical practice in medical malpractice actions, Ms. Eads filed a complaint for negligence in state court on August 8, 2006.<sup>68</sup> On February 21, 2007, the hospital filed a motion to dismiss the state court claim without prejudice for lack of subject matter jurisdiction, arguing that the claim was a claim for medical malpractice.<sup>69</sup> In response, Ms. Eads argued that her claim was based on premises liability and that it was not within the jurisdiction of the Act.<sup>70</sup> The state court agreed with Community Hospital and, on April 12, 2007, the state court dismissed Ms. Eads's claim without prejudice.<sup>71</sup>

On March 26, 2007, before the state court's dismissal of the negligence claim, Ms. Eads filed a proposed complaint for medical malpractice with the IDOI.<sup>72</sup> The hospital then filed a petition for preliminary determination<sup>73</sup> and a motion for summary judgment.<sup>74</sup> The hospital argued that the medical malpractice claim was barred as a matter of law based on the statute of limitations because it was not filed within two years of the alleged occurrence of medical malpractice under the Act.<sup>75</sup> The trial court, after a hearing, dismissed

---

62. *Id.* at 1014.

63. *Id.* Indiana's Journey's Account Statute is found at IND. CODE § 34-11-8-1 (2008).

64. *Eads*, 909 N.E.2d at 1011.

65. *Id.*

66. *Id.* (quoting Appendix of Appellant at 9, 909 N.E.2d 1009 (Ind. Ct. App. 2009)).

67. *Id.*

68. *Id.* The negligence claim was filed within the applicable two-year statute of limitations. *Id.* Complaints for medical malpractice, with certain exceptions, must be filed with the Department of Insurance before the complaint can be filed in court. IND. CODE § 34-18-8-4 (2008). The claim is then presented to a medical review panel, which renders an opinion. *Id.*

69. *Eads*, 909 N.E.2d at 1011-12.

70. *Id.* at 1011.

71. *Id.*

72. *Id.*

73. *See* IND. CODE § 34-18-11-1 (2008) ("A court having jurisdiction over the subject matter . . . may . . . (1) preliminarily determine an affirmative defense or issue of law or fact that may be preliminarily determined under the Indiana Rules of Procedure. . . .").

74. *Eads*, 909 N.E.2d at 1011-12.

75. *Id.* at 1012.

the medical malpractice claim with prejudice on June 11, 2008.<sup>76</sup> Ms. Eads appealed the trial court's ruling.<sup>77</sup>

The Indiana Court of Appeals noted that it was undisputed that Ms. Eads filed her complaint for medical malpractice after the applicable two-year statute of limitations had run.<sup>78</sup> However, Ms. Eads claimed that her lawsuit should be allowed to proceed under Indiana's Journey's Account Statute.<sup>79</sup> The Journey Account Statute's purpose "is to preserve the right of a diligent suitor to pursue a judgment on the merits."<sup>80</sup>

The court went on to explain that if Ms. Eads's medical malpractice claim was to be saved by the Journey's Account Statute, she must establish that her medical malpractice claim was a continuation of her negligence claim filed in state court.<sup>81</sup> It was significant to the court that Ms. Eads did not appeal the trial court's dismissal of her negligence complaint.<sup>82</sup> The court found that the medical malpractice claim was not a continuation of her negligence claim as there is a "basic distinction between a common law claim of negligence and the statutory medical malpractice regime."<sup>83</sup> Therefore, the court affirmed the judgment of the trial court granting summary judgment in favor of the hospital.<sup>84</sup>

---

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* IND. CODE § 34-11-8-1 (2008) states

(a) This section applies if a plaintiff commences an action and: (1) the plaintiff fails in the action from any cause except negligence in the prosecution of the action; (2) the action abates or is defeated by the death of a party; or (3) a judgment is arrested or reversed on appeal. (b) If subsection (a) applies, a new action may be brought not later than the later of: (1) three (3) years after the date of the determination under subsection (a); or (2) the last date an action could have been commenced under the statute of limitations governing the original action; and be considered a continuation of the original action commenced by the plaintiff.

80. *Eads*, 909 N.E.2d at 1013 (citing *Keenan v. Butler*, 869 N.E.2d 1284, 1290 (Ind. Ct. App. 2007)). The court went on to cite an Indiana Supreme Court case which stated:

The Journey's Account Statute applies by its terms to preserve only a "new action" that may be "a continuation of the first." Its typical use is to save an action filed in the wrong court by allowing the plaintiff enough time to refile the same claim in the correct forum. For example, the statute enables an action dismissed for lack of personal jurisdiction in one state to be refiled in another state despite the intervening running of the statute of limitations.

*Id.* (quoting *Cox v. Am. Aggregates Corp.*, 684 N.E.2d 193, 195 (Ind. 1997)).

81. *Id.*

82. *Id.* at 1014 (stating that if Ms. Eads truly believed that the trial court's dismissal of her negligence claim was incorrect then she would have appealed that decision).

83. *Id.* (explaining that the source of the liability between negligence and medical malpractice is "wholly different").

84. *Id.*



## II. JURISDICTION OF THE ACT

A claim for medical malpractice against a qualified health care provider must be presented to a medical review panel before the plaintiff proceeding with an action in a trial court.<sup>85</sup> Under the Act, malpractice is defined as “a tort or breach of contract based on health care or professional services that were provided, or that should have been provided, by a health care provider, to a patient.”<sup>86</sup> The statute defines health care as “an act or treatment performed or furnished, or that should have been performed or furnished, by a health care provider for, to, or on behalf of a patient during the patient’s medical care, treatment, or confinement.”<sup>87</sup> The Indiana Court of Appeals decided two cases during the Survey Period regarding subject-matter jurisdiction and the scope of the Act.

### A. Fairbanks Hospital v. Harrold

In *Fairbanks Hospital v. Harrold*,<sup>88</sup> the Indiana Court of Appeals determined whether a claim against a hospital for failure to adequately supervise an employee was a claim for medical malpractice.<sup>89</sup> Natalie Harrold was admitted to Fairbanks Hospital for in-patient, substance abuse treatment.<sup>90</sup> Counselor Larry Shears was involved in Ms. Harrold’s care while she was at Fairbanks.<sup>91</sup> Mr. Shears made unwanted sexual advances towards Ms. Harrold, and after Ms. Harrold was discharged, she reported Mr. Shears’ behavior to another employee at Fairbanks.<sup>92</sup> Fairbanks later discharged Mr. Shears.<sup>93</sup>

Fairbanks “double-filed”<sup>94</sup> a proposed complaint with the IDOI and a civil lawsuit in state court against Fairbanks.<sup>95</sup> The allegations against Fairbanks included negligent supervision and vicarious liability for the intentional torts, including a battery claim, of Mr. Shears.<sup>96</sup> The medical review panel in the IDOI case found that Fairbanks failed to comply with the applicable standard of care.<sup>97</sup>

Ms. Harrold then proceeded with her state court claim, and Fairbanks sought a determination of law that Ms. Harrold’s claims fell within the scope of the

---

85. IND. CODE § 34-18-8-4 (2008).

86. *Id.* § 34-18-2-18.

87. *Id.* § 34-18-2-13.

88. 895 N.E.2d 732 (Ind. Ct. App. 2008).

89. *Id.* at 733-34.

90. *Id.* at 734.

91. *Id.*

92. *Id.*

93. *Id.*

94. Often, when a plaintiff files both a complaint before the IDOI and in state court involving the identical cause of action, this is referred to as “double-filing.” The Act requires claims for medical malpractice to first be presented to a medical review panel before they can be heard in state court. IND. CODE § 34-18-8-4 (2008).

95. *Harrold*, 895 N.E.2d at 734.

96. *Id.*

97. *Id.*

Act.<sup>98</sup> The trial court determined that the Act did not cover Ms. Harrold's claims against Fairbanks.<sup>99</sup> The trial court then granted Fairbanks' request to certify its order for interlocutory appeal, and the Indiana Court of Appeals accepted jurisdiction over the interlocutory appeal.<sup>100</sup>

Fairbanks argued that Ms. Harrold's claim was based on whether Fairbanks made appropriate decisions in selecting individuals who could work with patients.<sup>101</sup> Fairbanks further argued that the claims were based on decisions that affected Ms. Harrold's health care and that therefore the claims fell within the scope of the Act.<sup>102</sup> However, the court found otherwise.<sup>103</sup> The court determined that both the claim of sexual misconduct against Mr. Shears, and the claim that Mr. Shears was in a position to carry out the sexual misconduct because of Fairbank's negligent supervision, must "sound in medical malpractice in order for the action to come within the Act's purview."<sup>104</sup> The court found that an "employee's sexual conduct with a patient cannot constitute a rendition of health care or professional services," and therefore the Act did not apply.<sup>105</sup>

#### B. Popovich v. Danielson

In the other case decided by the Indiana Court of Appeals during the Survey Period regarding subject-matter jurisdiction, the court determined that claims against a physician based on assault, battery, defamation, and breach of contract all fell within the jurisdiction of Act.<sup>106</sup>

On June 16, 2006, Patricia Popovich was involved in an automobile accident and was brought to the hospital by an ambulance.<sup>107</sup> Ms. Popovich suffered broken ribs as well as injuries to her chest, abdomen, and significant cuts to her legs.<sup>108</sup> Plastic surgeon, Dr. John Danielson, was called in for a consultation to examine Ms. Popovich.<sup>109</sup> Ms. Popovich alleged that Dr. Danielson spoke to her in a rude and demeaning manner and that he refused to provide her pain medication.<sup>110</sup> She further alleged that Dr. Danielson accused her of driving

---

98. *Id.*

99. *Id.* at 734-35.

100. *Id.* at 735.

101. *Id.*

102. *Id.* at 735-36.

103. *Id.* at 738.

104. *Id.*

105. *Id.* (citing *Grzan v. Charter Hosp. of Nw. Ind.*, 702 N.E.2d 786 (Ind. Ct. App. 1998); *Murphy v. Mortell*, 684 N.E.2d 1185 (Ind. Ct. App. 1997); *Doe ex rel. Roe v. Madison Ctr. Hosp.*, 652 N.E.2d 101 (Ind. Ct. App. 1995)).

106. *Popovich v. Danielson*, 896 N.E.2d 1196, 1198-1200 (Ind. Ct. App. 2008), *trans. denied*, No. 64A03-0804-CV-146, 2009 LEXIS 386 (Ind. Apr. 23, 2009).

107. *Id.* at 1198.

108. *Id.*

109. *Id.* at 1199.

110. *Id.*



drunk, which Dr. Danielson also noted in his medical report.<sup>111</sup> Ms. Popovich demanded that Dr. Danielson stop any and all treatment, and Ms. Popovich further claimed that Dr. Danielson charged an excessive amount for services.<sup>112</sup>

Ms. Popovich filed her complaint in state court rather than before the IDOI.<sup>113</sup> Dr. Danielson moved to dismiss Ms. Popovich's complaint on the basis that she failed to present her claims before a medical review panel before filing her complaint.<sup>114</sup> The trial court determined that it did not have subject matter jurisdiction over Ms. Popovich's claims and dismissed the case without prejudice.<sup>115</sup>

First, as for the assault and battery claim, the court of appeals determined that it fell within the purview of the Act.<sup>116</sup> The court decided that the alleged battery was based on Dr. Danielson's behavior while acting in his professional capacity and while providing medical services.<sup>117</sup> Second, the court analyzed Ms. Popovich's defamation claim, which alleged that Dr. Danielson deliberately misrepresented and falsified her physical and mental condition.<sup>118</sup> The court determined that this claim questioned Dr. Danielson's "exercise of professional expertise, skill, or judgment" and that the claim fell within the jurisdiction of the Act.<sup>119</sup>

Next, the court discussed Ms. Popovich's breach of contract claim against Dr. Danielson in which she alleged that Dr. Danielson failed to report accurately and correctly his necessary medical findings and observations in his medical report.<sup>120</sup> Like the defamation claim, the court determined that a medical review panel needed to address this claim and that it fell under the Act.<sup>121</sup> Finally, the court discussed Ms. Popovich's claim that Dr. Danielson committed fraud when he submitted an excessive medical bill.<sup>122</sup> The court determined that because Ms. Popovich failed to aver this claim specifically and sufficiently, it prevented the court from determining whether the claim fell under the Act.<sup>123</sup> Therefore, the court affirmed the ruling of the trial court.<sup>124</sup>

---

111. *Id.*

112. *Id.* at 1199-1200.

113. *Id.* at 1200.

114. *Id.*

115. *Id.* at 1198.

116. *Id.* at 1202.

117. *Id.*

118. *Id.*

119. *Id.* at 1203 (quoting *Collins v. Thakker*, 552 N.E.2d 507, 510 (Ind. Ct. App. 1990)).

120. *Id.*

121. *Id.*

122. *Id.* at 1203-04.

123. *Id.* at 1204.

124. *Id.*

### III. DAMAGES SOUGHT AGAINST THE PATIENT COMPENSATION FUND

The Act establishes a Patient Compensation Fund (the “Fund”), which acts as excess insurance for health care providers.<sup>125</sup> The total amount a plaintiff can recover for an act of malpractice occurring after June 30, 1999 is \$1,250,000; however, the total amount paid by the qualified health care provider is limited to \$250,000.<sup>126</sup> The remaining amount is paid by other liable health care providers or the Fund.<sup>127</sup> Often, Indiana courts have to adjudicate disputes regarding the damages a plaintiff is entitled to from the Fund.

#### A. Atterholt v. Herbst

In *Atterholt v. Herbst*,<sup>128</sup> a case decided by the Indiana Supreme Court during the Survey Period, the court determined that evidence of a patient’s odds of survival and ability to work is admissible in determining excess damages due from the Fund.<sup>129</sup> On March 6, 2002, Jeffry Herbst presented to his family physician with reports of “a fever, congestion, nausea, loss of appetite, and decreased urine output.”<sup>130</sup> Mr. Herbst’s physician diagnosed him with bilateral pneumonia and sent him to the hospital where he died later that night.<sup>131</sup> An autopsy determined that Mr. Herbst instead died from fulminant myocarditis, an acute inflammation of the heart.<sup>132</sup> Mr. Herbst’s estate sued the primary care physician and hospital where Mr. Herbst received care.<sup>133</sup> The estate settled with the physician and the hospital under a qualified settlement, allowing the estate access to the Fund for additional damages.<sup>134</sup>

The estate then brought an action to obtain excess damages from the Fund.<sup>135</sup> The estate moved for a determination of law that the question presented before the court was the amount of damages and “not the liability for, or the proximate cause of, such damages.”<sup>136</sup> The trial court granted the estate’s motion and at a

---

125. See IND. CODE § 34-18-6-1 (2008).

126. See *id.* § 34-18-14-3.

127. *Id.*

128. 902 N.E.2d 220 (Ind.), *reh’g granted, opinion clarified*, 907 N.E.2d 528 (Ind. 2009).

129. *Id.* at 224.

130. *Id.* at 221.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* Mr. Herbst’s estate anticipated that the Fund would rely on *Cahoon v. Cummings*, 734 N.E.2d 535, 541 (Ind. 2000), a case in which the Indiana Supreme Court held that “damages for negligently causing an increased risk of harm are ‘proportional to the increased risk attributable to the defendant’s negligent act or omission.’” *Herbst*, 902 N.E.2d at 221 (quoting *Cahoon*, 734 N.E.2d at 541). However, “[t]he Fund responded that it was not seeking to relitigate whether the providers were liable for [Mr.] Herbst’s death, but rather challenged the amount of damages attributable to the providers conduct.” *Id.*



bench trial, the Fund moved to submit expert evidence that even with appropriate care, Mr. Herbst had less than a ten percent chance of surviving the hospitalization.<sup>137</sup> The trial court excluded the Fund's evidence and found that the damages for the estate exceeded \$2.5 million.<sup>138</sup> Consequently, the court ordered that the Fund pay the statutory maximum of \$1 million.<sup>139</sup> The Fund appealed the trial court's ruling, and the Indiana Court of Appeals affirmed the trial court's decision.<sup>140</sup> The Indiana Supreme Court granted transfer.<sup>141</sup>

The court determined that evidence of an increased risk of harm is relevant to the valuation of damages.<sup>142</sup> Therefore, both the expert evidence of Mr. Herbst's chance of survival and his chance of working in the future were relevant to the determination of damages.<sup>143</sup> The court then remanded the case for a determination of the extent of the Fund's liability.<sup>144</sup>

### B. *Butler v. Indiana Department of Insurance*

In *Butler v. Indiana Department of Insurance*,<sup>145</sup> a second case decided by the Indiana Supreme Court during the Survey Period regarding excess damages from the Fund, the court analyzed the amount of medical expenses an estate should be able to recover in a wrongful death case involving the death of an unmarried adult with no dependants.<sup>146</sup>

Nondis Jane Butler filed a medical malpractice case against Clarian Health Partners, Inc. and several individual health care providers pursuant to the Act.<sup>147</sup> Before resolution of the case, Ms. Butler died leaving no dependants.<sup>148</sup> Ms. Butler's estate then settled with Clarian Health Partners in a structured settlement so that the estate could seek excess damages from the Fund.<sup>149</sup>

The Fund moved for partial summary judgment alleging that the estate could only recover the expenses Ms. Butler actually incurred for the medical care rather than the total amount of the medical bills.<sup>150</sup> The trial court determined that the estate was not entitled to "the difference between the total of medical bills received and the amounts actually paid and accepted as full satisfaction by the

---

137. *Id.* at 221-22.

138. *Id.*

139. *Id.*

140. *Id.* (citing *Atterholt v. Herbst*, 879 N.E.2d 1221, 1227 (Ind. Ct. App. 2008), *trans. granted, opinion vacated*, 902 N.E.2d 220 (Ind. 2009)).

141. *Id.*

142. *Id.* at 223.

143. *Id.*

144. *Id.* at 225.

145. 904 N.E.2d 198 (Ind. 2009).

146. *Id.* at 199.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

medical providers.”<sup>151</sup> The Indiana Court of Appeals affirmed the trial court’s decision, and the Indiana Supreme Court granted transfer.<sup>152</sup>

The Fund argued that in Indiana Code section 34-23-1-2,<sup>153</sup> the statute governing actions for wrongful death of unmarried adult persons without dependents, the plain language of the statute only permits recovery for expenses actually paid.<sup>154</sup> The estate responded by arguing that the statute refers to “reasonable” expenses and that the law is clear in common law tort actions that a plaintiff may recover the reasonable value of medical services, regardless of whether the plaintiff is personally liable for the bills.<sup>155</sup>

However, the court found it significant that the claim was not a common law tort claim but rather a statutory wrongful death claim.<sup>156</sup> The court then agreed with the Fund and found the applicable section of the statute to be unambiguous.<sup>157</sup> Therefore, the court held that, with respect to damages under Indiana Code section 34-23-1-2(c)(3)(A), the amount recoverable is the portion of the billed charges actually accepted rather than the total amount billed.<sup>158</sup>

#### IV. INCURRED RISK IN THE MEDICAL MALPRACTICE CONTEXT

The Indiana Supreme Court decided in *Spar v. Cha*<sup>159</sup> that, with possible exceptions, incurred risk is not a defense in a medical malpractice case based on negligent care or lack of informed consent.<sup>160</sup> Brenda Spar consulted with obstetrician/gynecologist, Dr. Jin Cha in 1999 and 2000 due to difficulty conceiving a child.<sup>161</sup> Dr. Cha suspected endometriosis.<sup>162</sup> Dr. Cha suggested a

---

151. *Id.* at 199-201. It is important to note that before the bench proceeding, the parties entered into a factual stipulation that Ms. Butler incurred medical bills for relevant treatment rendered in the total amount of \$410,062.46, of which \$25,979.75 was actually paid by the Estate. *Id.* at 199. The parties also entered into a partial settlement for the Fund to pay \$188,046.88 to settle all claims against the Fund except claims for “additional medical expenses that were not paid but were billed” to Ms. Butler or her estate. *Id.* at 200.

152. *Id.* at 201 (citing *Butler v. Ind. Dep’t of Ins.*, 875 N.E.2d 235 (Ind. Ct. App. 2007), *trans. granted, opinion vacated*, 904 N.E.2d 198 (Ind. 2008)).

153. The statute states, in part: “(c) In an action to recover damages for the death of an adult person, the damages: . . . (3) may include but are not limited to the following: (A) Reasonable medical, hospital, funeral, and burial expenses necessitated by the wrongful act or omission that caused the adult person’s death. . . .” IND. CODE § 34-23-1-2 (2008).

154. *Butler*, 904 N.E.2d at 201.

155. *Id.* at 201-02.

156. *Id.* at 202.

157. *Id.*

158. *Id.* at 203; *see* IND. CODE § 34-23-1-2(c)(3)(A) (2008)).

159. 907 N.E.2d 974 (Ind. 2009).

160. *Id.* at 976.

161. *Id.* at 977.

162. *Id.*



laparoscopy for Ms. Spar to determine if her fallopian tubes were clogged.<sup>163</sup> Dr. Cha performed laparoscopic surgery on Ms. Spar in 2001.<sup>164</sup> Before the procedure, Dr. Cha advised Ms. Spar of the risks associated with the procedure.<sup>165</sup> Two days after the procedure it was discovered that Ms. Spar's bowel had been perforated during the procedure and she experienced multiple post-operative complications.<sup>166</sup>

Ms. Spar later brought a medical malpractice case against Dr. Cha alleging that he failed to advise her of available alternative procedures and that he failed to obtain her informed consent in performing the laparoscopy.<sup>167</sup> The Medical Review Panel rendered a unanimous decision that Dr. Cha failed to comply with the standard of care, and Ms. Spar proceeded with her case in state court.<sup>168</sup> At trial, the jury was instructed on incurred risk.<sup>169</sup> In closing argument, Dr. Cha's counsel argued that because Ms. Spar was told of the risks of the procedure, she accepted and incurred the risk by going forward with the procedure.<sup>170</sup> The jury rendered a verdict in favor of Dr. Cha, and Ms. Spar appealed.<sup>171</sup> The Indiana Court of Appeals reversed and remanded the case, holding that "incurred risk is not a defense to claims of lack of informed consent or negligent performance of a medical procedure."<sup>172</sup> The Indiana Supreme Court granted transfer.<sup>173</sup>

The court agreed with the Indiana Court of Appeals that incurred risk "has little legitimate application in the medical malpractice context."<sup>174</sup> Ultimately, "[t]he patient is entitled to expect that the services will be rendered in accordance with the standard of care, however risky the procedure may be."<sup>175</sup> The court discussed that the only situation where incurred risk could be applicable in a medical malpractice case is when a patient refuses a blood transfusion prior to surgery based on religious reasons and later experiences complications for failing to undergo the blood transfusion.<sup>176</sup> The court also discussed that patients can waive the right to be informed, but that there was no evidence that Ms. Spar

---

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 978.

167. *Id.*

168. *Id.* at 978-79.

169. *Id.* at 979.

170. *Id.*

171. *Id.*

172. *Id.* (citing *Spar v. Cha*, 881 N.E.2d 70, 74-75 (Ind. Ct. App. 2008), *trans. granted, opinion vacated*, 907 N.E.2d 974 (Ind. 2009)).

173. *Id.*

174. *Id.* at 982.

175. *Id.*

176. *Id.* at 983 n.2 (citing *Shorter v. Drury*, 695 P.2d 116, 124 (Wash. 1985) (discussing a patient's refusal to receive a blood transfusion as a possible exception to the rule that incurred risk is not applicable in the medical malpractice context)).

waived her right to informed consent.<sup>177</sup> Therefore, the court concluded it was error for the trial court to instruct the jury on incurred risk and remanded the case for a new trial.<sup>178</sup>

#### V. ADMISSIBILITY OF AN EXPERT'S OPINION

In *Blaker v. Young*,<sup>179</sup> the final published case decided during the Survey Period, the Indiana Court of Appeals held that a plaintiff's expert witness's opinion was based on speculation and was not sufficient to demonstrate a genuine issue of material fact on the issue of breach of care.<sup>180</sup>

On March 24, 2003, neurosurgeon Dr. Ronald Young performed back surgery on Myers Blaker to attempt to relieve the headaches and neck pain Mr. Blaker had been experiencing.<sup>181</sup> Following surgery, Mr. Blaker went into respiratory arrest and required intubation.<sup>182</sup> An MRI showed that Mr. Blaker experienced a stroke in the area of the brain supplied by the posterior inferior cerebellar artery (PICA).<sup>183</sup>

Mr. Blaker then filed a medical malpractice claim against Dr. Young, and the Medical Review Panel issued the unanimous expert opinion that Dr. Young met the applicable standard of care in his treatment of Mr. Blaker.<sup>184</sup> Mr. Blaker then proceeded with his medical malpractice case in state court.<sup>185</sup> Dr. Young moved for summary judgment based on the unanimous panel opinion arguing there was no evidence he failed to meet the proper standard of care.<sup>186</sup> In response to Dr. Young's motion for summary judgment, Mr. Blaker presented an expert witness affidavit of Dr. Mitesh Shah, which stated, "I am of the opinion, *assuming* Dr. Young did not identify the right PICA during the surgery of March 24th, 2003, it is below a reasonable medical standard to not do so."<sup>187</sup> Mr. Blaker also submitted an affidavit of one of the medical review members, which stated, "I am willing to alter my impression such that *if* the right PICA was not identified and was injured because of that, then that would fall below the standard of care."<sup>188</sup>

---

177. *Id.* at 983.

178. *Id.*

179. 911 N.E.2d 648 (Ind. Ct. App. 2009), *reh'g denied*, No. 49A02-0811-CV-1038, 2009 Ind. App. LEXIS 2400 (Ind. Ct. App. Oct. 26, 2009), *trans. denied*, 2010 Ind. LEXIS 172 (Ind. Feb. 25, 2010).

180. *Id.* at 652.

181. *Id.* at 649.

182. *Id.*

183. *Id.* at 649-50.

184. *Id.* at 650.

185. *Id.*

186. *Id.* at 651.

187. *Id.* (quoting Appendix of Appellant at 81, 911 N.E.2d 648 (Ind. Ct. App. 2009) (emphasis in original)).

188. *Id.* (quoting Appendix of Appellant at 88, 911 N.E.2d 648 (Ind. Ct. App. 2009) (emphasis in original)).



The trial court granted summary judgment in favor of Dr. Young and found that Mr. Blaker failed to designate any admissible expert opinion to create a genuine issue of material fact for trial.<sup>189</sup> Mr. Blaker appealed.<sup>190</sup>

The Indiana Court of Appeals affirmed the decision of the trial court.<sup>191</sup> The court noted that Mr. Blaker's experts failed to state a definite opinion that Dr. Young failed to meet the appropriate standard of care and that the hypothetical stated in the two affidavits was based on speculation.<sup>192</sup> Therefore, it was not enough for the experts to opine that *if* Dr. Young failed to do something, it resulted in a breach of the standard of care.<sup>193</sup>

#### CONCLUSION

Indiana's courts will continue to grapple with the provisions of the Act and how they apply to medical malpractice cases. In addition, although the Indiana General Assembly did not add to, amend, or repeal any section of the Act during the Survey Period, pressure to do so certainly comes from the plaintiff's bar. As two Marion County trial courts rendered verdicts in excess of \$5 million<sup>194</sup> during the Survey Period in medical malpractice cases,<sup>195</sup> the General Assembly will continue to weigh arguments regarding the provisions of the Act and specifically, whether to increase the damage caps under the Act.

---

189. *Id.*

190. *Id.* at 649.

191. *Id.*

192. *Id.* at 652.

193. *Id.*

194. The verdicts will be reduced to \$1.25 million under the Act.

195. INDIANA CO-COUNSEL 4 (Sept. 2009); Jeff Swiatek, *Widower Might Challenge Malpractice Cap*, INDIANAPOLIS STAR, Sept. 5, 2009, at 1A.





# SURVEY OF RECENT DEVELOPMENTS IN INDIANA PRODUCT LIABILITY LAW

JOSEPH R. ALBERTS\*  
JAMES PETERSEN\*\*  
ROBERT B. THORNBURG\*\*\*

## INTRODUCTION

With respect to Indiana product liability litigation, most observers probably will remember the 2009 survey period<sup>1</sup> more for questions that courts did not answer than for those they did answer. Indeed, it is apparent that practitioners and judges who deal with product liability matters in Indiana continue their struggle to come to grips with the intended scope of the Indiana Product Liability Act (IPLA).<sup>2</sup> This Survey does not attempt to address in detail all of the cases decided during the survey period that involve product liability issues.<sup>3</sup> Rather, it examines selected cases that discuss the more important substantive concepts. This Survey also provides some background information, context, and commentary when appropriate.

---

\* Litigation Counsel, The Dow Chemical Company, Midland, Michigan and Dow AgroSciences LLC, Indianapolis. B.A., *cum laude*, 1991, Hanover College; J.D., *magna cum laude*, 1994, Indiana University School of Law—Indianapolis.

\*\* Partner, Ice Miller LLP, Indianapolis. B.A., 1970, Illinois State University; M.A., 1973, University of Illinois; J.D., *magna cum laude*, 1976, Indiana University Maurer School of Law—Bloomington. The authors greatly appreciate the research and drafting assistance provided by Christina Laun Fugate, Attorney, Ice Miller LLP, Indianapolis, B.A., *magna cum laude*, 2004, Butler University, J.D., *cum laude*, 2007, Indiana University School of Law—Indianapolis.

\*\*\* Member, Frost Brown Todd LLC, Indianapolis. B.S., *cum laude*, Ball State University; J.D., 1996, Indiana University Maurer School of Law—Bloomington.

1. The survey period is October 1, 2008, to September 30, 2009.

2. IND. CODE §§ 34-20-1-1 to 9-1 (2008). This Article follows the lead of the Indiana General Assembly and employs the term “product liability” (not “products liability”) when referring to actions governed by the IPLA.

3. Courts issued several important opinions in cases in which the theory of recovery was related to, or in some way based upon “product liability” principles, but the appellate issue did not involve a question implicating substantive Indiana product liability law. This Article does not address those decisions in detail because of space constraints, even though they may be interesting to Indiana product liability practitioners. *See generally* Indianapolis-Marion County Pub. Library v. Charlier Clark & Linard, P.C., 900 N.E.2d 801 (Ind. Ct. App. 2009) (addressing the differences between damage caused by a defective product as opposed to defective rendering of services in a general negligence context), *trans. granted, opinion vacated*, 919 N.E.2d 547 (Ind. 2009), *remanded by* 929 N.E.2d 838 (Ind. Ct. App. 2010), *adopted by* No. 06S05-0907-CV-332, 2010 Ind. LEXIS 397 (Ind. June 29, 2010).

## I. THE SCOPE OF THE IPLA

The Indiana General Assembly first enacted the IPLA in 1978.<sup>4</sup> It originally governed claims in tort utilizing both negligence and strict liability theories. In 1983, the General Assembly amended it to apply only to strict liability actions.<sup>5</sup> In 1995, the General Assembly amended the IPLA to encompass once again theories of recovery based upon both strict liability and negligence.<sup>6</sup>

In 1998, the General Assembly repealed the entire IPLA and recodified it, effective July 1, 1998.<sup>7</sup> The 1998 recodification did not make substantive revisions; it merely redesignated the statutory numbering system to make the IPLA consistent with the General Assembly's reconfiguration of statutes governing civil practice.

The IPLA, Indiana Code sections 34-20-1-1 to -9-1, governs and controls all actions that are brought by users or consumers against manufacturers or sellers for physical harm caused by a product, "regardless of the substantive legal theory or theories upon which the action is brought."<sup>8</sup> When Indiana Code sections 34-20-1-1 and -2-1 are read together, there are five unmistakable threshold requirements for IPLA liability: (1) a claimant who is a user or consumer and is also "in the class of persons that the seller should reasonably foresee as being subject to the harm caused";<sup>9</sup> (2) a defendant that is a manufacturer or a "seller . . . engaged in the business of selling [a] product";<sup>10</sup> (3) "physical harm caused by a product";<sup>11</sup> (4) a product that is "in a defective condition unreasonably dangerous to [a] user or consumer" or to his property;<sup>12</sup> and (5) a product that "reach[ed] the user or consumer without substantial alteration in [its] condition."<sup>13</sup> Indiana Code section 34-20-1-1 makes clear that the IPLA governs

4. Pub. L. No. 141, § 28, 1978 Ind. Acts 1308, 1308-10.

5. Pub. L. No. 297, § 1, 1983 Ind. Acts 1815.

6. Pub. L. No. 278, §§ 1-7, 1995 Ind. Acts 4051, 4051-56; *see* *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 487 n.2 (Ind. 2001).

7. Pub. L. No. 1, 1998 Ind. Acts 1. The current version of the IPLA is found in Indiana Code sections 34-20-1-1 to -9-1.

8. IND. CODE § 34-20-1-1 (2008).

9. *Id.* § 34-20-2-1(1). Indiana Code section 34-20-1-1 identifies a proper IPLA claimant as a "user" or "consumer." *Id.* § 34-20-1-1(1). Indiana Code section 34-20-2-1(1) requires that IPLA claimants be "in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition." *Id.*

10. Indiana Code section 34-20-1-1(2) identifies proper IPLA defendants as "manufacturers" or "sellers." *Id.* § 34-20-1-1(2). Indiana Code section 34-20-2-1(2) provides the additional requirement that such a manufacturer or seller also be "engaged in the business of selling the product," effectively excluding corner lemonade stand operators and garage sale sponsors from IPLA liability. *Id.*

11. *Id.* § 34-20-1-1(3).

12. *Id.* § 34-20-2-1.

13. *Id.* § 34-20-2-1(3). Indiana Pattern Jury Instruction § 7.03 sets out a plaintiff's burden of proof in a product liability action. The instruction requires a plaintiff to "prove each of the



and controls all claims that satisfy these five requirements, “regardless of the substantive legal theory or theories upon which the action is brought.”<sup>14</sup>

A. “User” or “Consumer”

The language the General Assembly employs in the IPLA is important for determining who qualifies as an IPLA claimant. Indiana Code section 34-20-1-1 provides that the IPLA governs claims asserted by “users” and “consumers.”<sup>15</sup> For purposes of the IPLA, “consumer” means:

- (1) a purchaser;
- (2) any individual who uses or consumes the product;
- (3) any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question; or
- (4) any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.<sup>16</sup>

“User” has the same meaning as “consumer.”<sup>17</sup> Several published decisions in recent years construe the statutory definitions of “user” and “consumer.”<sup>18</sup>

---

following propositions by a preponderance of the evidence”:

1. The defendant was a manufacturer of the product [or the part of the product] alleged to be defective and was in the business of selling the product;
2. The defendant sold, leased[,] or otherwise put the product into the stream of commerce;
3. The plaintiff was a user or consumer of the product;
4. The product was in a defective condition unreasonably dangerous to users or consumers (or to a user’s or consumer’s property);
5. The plaintiff was in a class of persons the defendant should reasonably have foreseen as being subject to the harm caused by the defective condition;
6. The product was expected to and did reach the plaintiff without substantial alteration of the condition in which the defendant sold the product;
7. The plaintiff or plaintiff’s property was physically harmed; and
8. The product was a proximate cause of the physical harm to the plaintiff or the plaintiff’s property.

IND. PATTERN JURY INSTRUCTIONS—CIVIL § 7.03 (2005).

14. IND. CODE § 34-20-1-1 (2008).

15. *Id.*

16. *Id.* § 34-6-2-29.

17. *Id.* § 34-6-2-147.

18. See *Butler v. City of Peru*, 733 N.E.2d 912, 919 (Ind. 2000) (mentioning that a maintenance worker could be considered a “user or consumer” of an electrical transmission system because his employer was the ultimate user and he was an employee of the “consuming entity”); *Estate of Shebel v. Yaskawa Elec. Am., Inc.*, 713 N.E.2d 275, 279 (Ind. 1999) (holding that a “user or consumer” includes a distributor who uses the product extensively for demonstration purposes). For a more detailed analysis of *Butler*, see Joseph R. Alberts & David M. Henn, *Survey of Recent*

A literal reading of the IPLA demonstrates that even if a claimant qualifies as a statutorily-defined “user” or “consumer,” he or she also must satisfy another statutorily-defined threshold before proceeding with a claim under the IPLA.<sup>19</sup> That additional threshold is found in Indiana Code section 34-20-2-1(1), which requires that the “user” or “consumer” also be “in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition.”<sup>20</sup> Thus, the plain language of the statute assumes that a person or entity must already qualify as a “user” or a “consumer” *before* a separate “reasonable foreseeability” analysis is undertaken. In that regard, the IPLA does not appear to provide for remedy to a claimant whom a seller might reasonably foresee as being subject to the harm caused by a product’s defective condition if that claimant falls outside of the IPLA’s definition of “user” or “consumer.”

Courts in Indiana have been relatively quiet since 2006 when it comes to interpreting the terms “user” or “consumer.”<sup>21</sup> One federal trial court decision during the 2009 survey period, however, addressed the issue. In *Pawlik v. Industrial Engineering & Equipment Co., Inc.*,<sup>22</sup> the plaintiff was injured loading a crate containing electrical duct heaters onto the truck of his employer, Circle R Mechanical, Inc. Industrial manufactured the duct heaters and encased them

---

*Developments in Indiana Product Liability Law*, 34 IND. L. REV. 857, 870-72 (2001). For a more detailed analysis of *Estate of Shebel*, see Joseph R. Alberts, *Survey of Recent Developments in Indiana Product Liability Law*, 33 IND. L. REV. 1331, 1333-36 (2000).

19. IND. CODE § 34-20-2-1(1) (2008).

20. *Id.* Indiana Code section 34-20-2-1 imposes liability when a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user’s or consumer’s property . . . if . . . that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition.

21. During the 2006 survey period, the Indiana Supreme Court decided *Vaughn v. Daniels Co. (West Virginia), Inc.*, 841 N.E.2d 1133 (Ind. 2006). That case helped to further define who qualifies as a “user” or “consumer” for purposes of bringing an action under the IPLA. In that case, Daniels Company (“Daniels”) designed and built a coal preparation plant at a facility owned by Solar Sources, Inc. (“Solar”). *Id.* at 1136. Part of the design involved the installation of a heavy media coal sump. *Id.* An out-of-state steel company manufactured the sump that Daniels designed and sent it, unassembled, to the facility. *Id.* Stephen Vaughn worked for the construction company that Daniels hired to install the sump. *Id.* During the installation process, Vaughn climbed onto the top of the sump to help connect a pipe. *Id.* The chain he was using to secure the pipe in place gave way, causing Vaughn to fall and sustain injuries. *Id.* Vaughn did not wear his safety belt when he climbed onto the sump. *Id.* The Indiana Supreme Court held that Daniels could not be liable under the IPLA because Vaughn was not a “user” or “consumer.” *Id.* at 1141-43. Because the “product” was not assembled and installed at the time of Vaughn’s accident, “neither Vaughn nor anyone else was a user of the product at the time it was still in the process of assembly and installation.” *Id.* at 1139.

22. No. 2:07-CV-220, 2009 WL 857476 (N.D. Ind. March 27, 2009).



in a wooden shipping crate.<sup>23</sup> The duct heaters were ultimately scheduled to be delivered to and installed at a facility in Portage, Indiana.<sup>24</sup> As the plaintiff was loading the crate onto the truck, at least one of the wooden slats on the crate detached, causing the plaintiff to fall backward and sustain injury.<sup>25</sup> The plaintiff filed a complaint against Industrial alleging that the crate was defective.<sup>26</sup> Industrial filed a motion for summary judgment arguing, among other things, that the plaintiff was not a user or consumer under the IPLA.<sup>27</sup>

The court began its analysis by turning to Indiana Code section 34-20-1-1, which requires a plaintiff to qualify as a user or consumer in order to recover under the IPLA.<sup>28</sup> The court found that neither the plaintiff nor Circle R were “users” or “consumers.”<sup>29</sup> The products to be delivered and installed—the duct heaters—were not “used” or “consumed” by the plaintiff.<sup>30</sup> Circle R and the plaintiff were simply the intermediaries charged with transport and installation.<sup>31</sup> Under these circumstances, the court concluded that the IPLA claim failed because neither the plaintiff nor his employer qualified as a user or consumer.<sup>32</sup>

#### B. “Manufacturer” or “Seller”

For purposes of the IPLA, “[m]anufacturer” . . . means a person or an entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer.”<sup>33</sup> “Seller” . . . means a person engaged in the business of selling or leasing a product for resale, use, or consumption.”<sup>34</sup> Indiana Code section 34-20-2-1(2) employs nearly identical language when addressing the threshold requirement that liability under the IPLA will not attach unless “the seller is engaged in the business of selling the product.”<sup>35</sup>

---

23. *Id.* at \*1.

24. *Id.*

25. *Id.*

26. *Id.* at \*2.

27. *Id.*

28. *Id.* at \*4.

29. *Id.* at \*5.

30. *Id.*

31. *Id.*

32. *Id.*

33. IND. CODE § 34-6-2-77(a) (2008).

34. *Id.* § 34-6-2-136.

35. *Id.* § 34-20-2-1(2); *see, e.g., Williams v. REP Corp.*, 302 F.3d 660, 662-64 (7th Cir. 2002) (recognizing that Indiana Code section 33-1-1.5-2(3), the predecessor to Indiana Code section 34-20-2-1, imposes a threshold requirement that an entity must have sold, leased, or otherwise placed a defective and unreasonably dangerous product into the stream of commerce before IPLA liability can attach and before that entity can be considered a “manufacturer” or “seller”); *Del Signore v. Asphalt Drum Mixers*, 182 F. Supp. 2d 730, 745-46 (N.D. Ind. 2002) (holding that although the defendant provided some technical guidance or advice relative to ponds

Courts hold sellers liable as manufacturers in two ways. First, a seller can be held liable as a manufacturer if the seller fits within the definition of “manufacturer” found in Indiana Code section 34-6-2-77(a), which expressly includes a seller who:

- (1) has actual knowledge of a defect in a product;
- (2) creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process;
- (3) alters or modifies the product in any significant manner after the product comes into the seller’s possession and before it is sold to the ultimate user or consumer;
- (4) is owned in whole or significant part by the manufacturer; or
- (5) owns in whole or significant part the manufacturer.<sup>36</sup>

Second, a seller can be deemed a statutory “manufacturer” and, therefore, be held liable to the same extent as a manufacturer in one other limited circumstance.<sup>37</sup> Indiana Code section 34-20-2-4 provides that a seller may be deemed a “manufacturer” “[i]f a court is unable to hold jurisdiction over a particular manufacturer” and if the seller is the “manufacturer’s principal distributor or seller.”<sup>38</sup>

Practitioners also must be aware that when the theory of liability is based upon “strict liability in tort,”<sup>39</sup> Indiana Code section 34-20-2-3 provides that an entity that is merely a “seller” and cannot otherwise be deemed a “manufacturer”

---

at an asphalt plant, such activity was not sufficient to constitute substantial participation in the integration of the plant with the pond so as to deem it a “manufacturer” of the plant); *see also* Joseph R. Alberts & James M. Boyers, *Survey of Recent Developments in Indiana Product Liability Law*, 36 IND. L. REV. 1165, 1170-72 (2003).

36. IND. CODE § 34-6-2-77(a) (2008).

37. *Id.* § 34-20-2-4.

38. *Id. Kennedy v. Guess, Inc.*, 806 N.E.2d 776 (Ind. 2004), is the most recent case interpreting Indiana Code section 34-20-2-4 and specifically addressing the circumstances under which entities may be considered “manufacturers” or “sellers” under the IPLA. *See also* Goines v. Fed. Express Corp., No. 99-CV-4307-JPG, 2002 U.S. Dist. LEXIS 5070, at \*14-15 (S.D. Ill. Jan. 8, 2002). The court, applying Indiana law, examined the “unable to hold jurisdiction over” requirement of Indiana Code section 34-20-2-4. *Id.* at \*9. The plaintiff assumed that “jurisdiction” referred to the power of the court to hear a particular case. *Id.* at \*12. The defendant argued that the phrase equates to “personal jurisdiction.” *Id.* The court refused to resolve the issue, deciding instead to simply deny the motion for summary judgment because the designated evidence did not clearly establish entitlement to application of Indiana Code section 34-20-2-4. *Id.* at \*14-15.

39. The phrase “strict liability in tort,” to the extent that it is intended to mean “liability without regard to reasonable care,” appears to encompass only claims that attempt to prove that a product is defective and unreasonably dangerous by utilizing a manufacturing defect theory. Indiana Code section 34-20-2-2 provides that a negligence standard governs cases utilizing a design defect or a failure to warn theory, not a “strict liability” standard. IND. CODE § 34-20-2-2 (2008).



is not liable and is not a proper IPLA defendant.<sup>40</sup>

This has been a relatively active area of product liability law in recent years and a number of recent Indiana decisions, particularly from Indiana federal courts, have addressed the statutory definitions of “seller” and “manufacturer.”<sup>41</sup> The 2009 survey period continued that trend, producing three more decisions from Indiana federal courts in this context.

The first case, *Duncan v. M & M Auto Service, Inc.*,<sup>42</sup> involved the explosion of a van’s natural gas fuel tank. M & M, the defendant, installed the natural gas system on the van.<sup>43</sup> During the installation, M & M used a fuel conversion kit purchased from Jasper Engine.<sup>44</sup> M & M also performed routine maintenance on

---

40. *Id.* § 34-20-2-3. In *Ritchie v. Glidden Co.*, 242 F.3d 713, 725-26 (7th Cir. 2001), the court cited what is now Indiana Code section 34-20-2-3 for the proposition that sellers in a product liability action may not be liable unless the seller can be deemed a manufacturer. Applying that reading of what is now Indiana Code section 34-20-2-3, the court held that defendant Glidden could not be liable pursuant to the IPLA because the plaintiff failed to designate sufficient facts to demonstrate that Glidden had actual knowledge of an alleged product defect (lack of warning labels). *Id.* Glidden also did not meet any of the other statutory definitions or circumstances under which it could be deemed a manufacturer. *Id.* The *Ritchie* court’s citation omits what is now Indiana Code section 34-20-2-3, a potentially significant omission. The statutory provision quoted in *Ritchie* leaves out the following important highlighted language: “[A] product liability action [based on the doctrine of strict liability in tort] may not be commenced or maintained. . . .” *Id.* at 725 (emphasis added). The *Ritchie* case involved a failure to warn claim against Glidden under the IPLA. *Id.* The IPLA makes it clear that liability without regard to the exercise of reasonable care (strict liability) applies only to product liability claims alleging a manufacturing defect theory, and a negligence standard controls claims alleging design or warning defect theories. See, e.g., *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 899 (N.D. Ind. 2002); see also *Alberts & Boyers, supra* note 35, at 1173-75.

41. E.g., *Mesman v. Crane Pro Servs.*, 512 F.3d 352, 356 (7th Cir. 2008) (finding that defendant company rebuilt a crane and altered its design to enable it to be operated from ground level rather than from an overhead cab could not avoid IPLA liability under those circumstances); *LaBonte v. Daimler-Chrysler*, No. 3:07-CV-232, 2008 WL 513319, \*1-2 (N.D. Ind. Feb. 22, 2008) (finding that a defendant company that purchased the assets of seat belt manufacturer and subsequently discharged debts in bankruptcy was entitled to summary judgment because it was found to be neither the manufacturer of the seat belt nor liable as a successor corporation to the manufacturer). For a detailed discussion about *Mesman* and *LaBonte*, see Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 42 IND. L. REV. 1093, 1098-1102 (2009). See also *Fellner v. Philadelphia Toboggan Coasters, Inc.*, No. 3:05-cv-218-SEB-WGH, 2006 WL 2224068 (S.D. Ind. Aug. 2, 2006) (involving a girl who was killed when she was ejected from a wooden roller coaster operated as an attraction at Holiday World amusement park); *Thornburg v. Stryker Corp.*, No. 1:05-cv-1378-RLY-TAB, 2006 WL 1843351 (S.D. Ind. June 29, 2006) (involving a plaintiff who filed product liability and medical malpractice claims after hip replacement surgery).

42. 898 N.E.2d 338 (Ind. Ct. App. 2008).

43. *Id.* at 340.

44. *Id.*

the natural gas system.<sup>45</sup> The plaintiff was injured when gas escaped while he was filling the van's fuel tank.<sup>46</sup> The plaintiff alleged both that the fuel tank should have been equipped with a redundant check valve that would have prevented gas from escaping and that M & M should have known that this valve was necessary.<sup>47</sup>

M & M filed a motion for summary judgment arguing that under Indiana Code section 34-20-2-3, it could not be subject to a product liability claim because it did not manufacture the fuel system.<sup>48</sup> The plaintiff argued that although M & M was not the actual manufacturer of the natural gas system, M & M should be treated as an "apparent manufacturer" because M & M's invoice for the fuel system did not state the name of the fuel system's manufacturer.<sup>49</sup> Under Indiana Code section 34-20-2-3, however, a product liability action based on the doctrine of strict liability in tort cannot be commenced against a seller of a product unless the seller is also the manufacturer of the product or part of the product alleged to be defective.<sup>50</sup> Thus, M & M argued that because it did not manufacture the natural gas system, it could not be liable under a strict liability theory even though it sold the product.<sup>51</sup> The court agreed and found that M & M could not be held liable under a strict liability theory as an apparent manufacturer.<sup>52</sup>

The *Pawlik* case, addressed above in the "user" and "consumer" context, is the second of the three 2009 survey period decisions confronting the issue of whether a named defendant qualified as a "seller" of a "product" under the IPLA. In *Pawlik*, the U.S. District Court the Northern District of Indiana addressed whether the manufacturer of a product can be liable when the product's shipping package comes apart and causes injury.<sup>53</sup> In *Pawlik*, the plaintiff was injured while loading a crate containing duct heaters.<sup>54</sup> Part of the crate detached, causing the plaintiff to fall backward and sustain injury.<sup>55</sup> The plaintiff sued the manufacturer of the duct heater, Industrial, who moved for summary judgment arguing that it was not the "manufacturer" of the crate for purposes of the IPLA.<sup>56</sup>

---

45. *Id.*

46. *Id.*

47. *Id.* at 340-41.

48. *Id.* at 341-42.

49. *Id.* at 342.

50. IND. CODE § 34-20-2-3 (2008).

51. *Duncan*, 898 N.E.2d at 342. The court noted that in *Kennedy v. Guess, Inc.*, 806 N.E.2d 776, 783 (Ind. 2004), the Indiana Supreme Court recognized the apparent manufacturer theory; however, the court noted that theory was recognized as applying only to negligence claims because Indiana Code section 34-20-2-3 specifically requires the seller to be a manufacturer of the product in order to be held liable on a strict liability theory. *Id.*

52. *Id.*

53. No. 2:07 CV 220, 2009 WL 857476, at \*5 (N.D. Ind. Mar. 27, 2009).

54. *Id.* at \*1.

55. *Id.*

56. *Id.* at \*2.



The court agreed with Industrial: “The crate contained and protected the Industrial products and was not meant to be opened and unpacked until its receipt at the installation site. Industrial does not sell crates, nor can Industrial be classified as a manufacturer of crates.”<sup>57</sup> Because the crate was gratuitously provided as a means to transport the duct heaters, the court found that Industrial was not a “manufacturer” or “seller” of crates under the IPLA.<sup>58</sup>

The third decision applying the IPLA’s definition of a “seller” to a named defendant in a product liability case is *Gibbs v. I-Flow, Inc.*<sup>59</sup> The court’s discussion about the “manufacturer” or “seller” requirement took place in the context of determining whether the plaintiff’s motion for remand to state court should be granted.<sup>60</sup> In *Gibbs*, the plaintiff claimed that he suffered a complete loss of cartilage in his shoulder after the insertion of a pain pump that continuously released dangerous doses of anesthetics.<sup>61</sup> The plaintiff sued the manufacturer of the pain pump, I-Flow, and the individual I-Flow sales representative, Rowland.<sup>62</sup> The plaintiff alleged that Rowland sold the pain pump, with knowledge of a defect in the product, to the plaintiff’s doctor and instructed the plaintiff’s doctor on the medications and procedure for filling the pain pump.<sup>63</sup> The defendants sought to remove the case to federal court, arguing that the plaintiffs fraudulently joined Rowland to defeat diversity.<sup>64</sup> They argued that the plaintiff could not maintain product liability claim against Rowland because Rowland was neither a manufacturer nor a seller of the pain pump.<sup>65</sup> The court found that the plaintiffs properly joined Rowland because Rowland could be considered a manufacturer under Indiana Code section 34-6-2-77(a)(1), which defines a manufacturer as a seller who has “actual knowledge of a defect in a product.”<sup>66</sup>

On the motion to remand to state court, the district court had to determine whether there was a “reasonable possibility” that the plaintiff would succeed on its product liability claim against Rowland.<sup>67</sup> The court found that Rowland could qualify as a manufacturer under Indiana Code section 34-6-2-77(a)(1) because the plaintiff alleged that Rowland had actual knowledge of the problems with the pain pump.<sup>68</sup> The court also found that Rowland could qualify as a seller under Indiana Code section 34-6-2-136 because, “as a sales representative, she was employed to promote and sell the pain pumps to doctors and medical

---

57. *Id.* at \*6.

58. *Id.*

59. No. 1:08-cv-708-WTL-TAB, 2009 U.S. Dist. LEXIS 14895 (S.D. Ind. Feb. 24, 2009).

60. *Id.* at \*1.

61. *Id.* at \*2.

62. *Id.* at \*3.

63. *Id.* at \*2-3.

64. *Id.* at \*3.

65. *Id.* at \*7.

66. *Id.* at \*8 (citing IND. CODE § 34-6-2-77(a)(1) (2008)).

67. *Id.* at \*6.

68. *Id.* at \*9.

offices.”<sup>69</sup> Thus, the court held that the plaintiff had a “reasonable possibility” of prevailing on his product liability claim against Rowland, and Rowland was not fraudulently joined.<sup>70</sup>

### C. *Physical Harm Caused by a Product*

For purposes of the IPLA, “[p]hysical harm” . . . means bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property.”<sup>71</sup> It “does not include gradually evolving damage to property or economic losses from such damage.”<sup>72</sup>

For purposes of the IPLA, “[p]roduct” . . . means any item or good that is personalty at the time it is conveyed by the seller to another party.”<sup>73</sup> “The term does not apply to a transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.”<sup>74</sup>

During the 2009 survey period, federal trial courts in Indiana twice issued decisions addressing whether “products” were involved. First, in *Carlson Restaurants Worldwide, Inc. v. Hammond Professional Cleaning Services*,<sup>75</sup> the plaintiff operated a TGI Friday’s restaurant in Merrillville, Indiana, which caught fire on May 10, 1996.<sup>76</sup> The plaintiff sued Ansul Incorporated (“Ansul”), which manufactured the restaurant’s fire suppression system.<sup>77</sup> The plaintiff claimed that the fire suppressant was “defective in design and unreasonably dangerous[.]”

---

69. *Id.*

70. *Id.* at \*11.

71. IND. CODE § 34-6-2-105(a) (2008).

72. *Id.* § 34-6-2-105(b); *see, e.g.,* *Miceli v. Ansell, Inc.*, 23 F. Supp. 2d 929, 933 (N.D. Ind. 1998) (denying a motion to dismiss a case determining that Indiana recognizes that pregnancy may be considered a “harm” in certain circumstances); *Fleetwood Enters., Inc. v. Progressive N. Ins. Co.*, 749 N.E.2d 492, 493 (Ind. 2001) (holding that “personal injury and damage to other property from a defective product are actionable under the [IPLA], but their presence does not create a claim under the Act for damage to the product itself”); *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 486 (Ind. 2001) (holding that there is no recovery under the IPLA when a claim is based on damage to the defective product itself); *see also* *Great N. Ins. Co. v. Buddy Gregg Motor Homes, Inc.*, No. IP 00-1378-C-H/K, 2002 U.S. Dist. LEXIS 7830, at \*2 (S.D. Ind. Apr. 29, 2002) (holding that there was no recovery under the IPLA in a case involving a motor home destroyed in a fire allegedly caused by a defective wire in the engine compartment).

73. IND. CODE § 34-6-2-114(a) (2008).

74. *Id.* § 34-6-2-114(b); *see also* *Fincher v. Solar Sources, Inc.*, No. 42A01-0701-CV-25, 2007 WL 1953473, \*6 (Ind. Ct. App. July 6, 2007) (mem.), *trans. denied*, 878 N.E.2d 218 (Ind. 2007) (agreeing with the trial court that coal sludge is not a product under the IPLA, but rather a “waste by-product of a coal mining operation” that is “not marketable or ever in a marketed state,” nor ever “intended for consumption or for any use by any consumer”).

75. No. 2:06 cv 336, 2008 U.S. Dist. LEXIS 91878 (N.D. Ind. Nov. 12, 2008).

76. *Id.* at \*1-4.

77. *Id.* at \*2.



and that Ansul was negligent in its maintenance and service of the system.<sup>78</sup> The Ansul system utilized a low pH chemical fire suppressant agent called “Ansulex.”<sup>79</sup> The Ansul system was installed at the restaurant in March or April 1995.<sup>80</sup> Because of problems with Ansulex crystallizing and clogging the nozzles, Ansul implemented a program a few months later, in November 1995, under which technicians examined the tanks for crystallization and added EDTA to the tank to help prevent crystallization and corrosion.<sup>81</sup> The first such service visit inspection occurred on April 26, 1996, at which time an “‘Ansul Inspected’ sticker was affixed to the system to denote performance of the newly required corrective actions for prevention of crystallization, and the inspection report included the notation, ‘Ansul Inspected EDTA added.’”<sup>82</sup>

Because the plaintiff did not file suit until October 6, 2006, Ansul moved for summary judgment, arguing that Indiana’s ten-year product liability statute of repose<sup>83</sup> barred the claims.<sup>84</sup> The plaintiff responded by arguing that although the system itself was delivered more than ten years before the fire, “the Ansulex chemical fire suppressant stored in the system tank and released upon heat sensor activation is the liability-triggering product.”<sup>85</sup> The plaintiff contended that the delivery of the fire suppressant material in April 1996 in effect injected a new “liability-triggering product” into the mix, thereby triggering a new ten-year statutory repose period and precluding summary judgment.<sup>86</sup> The court agreed with the plaintiff, and denied the motion for summary judgment, reasoning as follows:

Adding new Ansulex to the fire suppression system appears to be “merely adding a component, without extending the life of the original product” . . . . But adding EDTA to the defective Ansulex, which had been found to crystallize and corrode the fire suppression systems, in an effort to thwart crystallization . . . appears to be an attempt to extend the life of the original faulty chemical product. In short, the change in chemicals was not a mere repair, but is a restructuring or reconditioning . . . which Ansul described . . . as “corrective actions” implemented to “eliminate the possibility of this situation affecting new systems.”<sup>87</sup>

In *Chappey v. Ineos USA L.L.C.*,<sup>88</sup> the plaintiff was an employee of a BP Amoco facility in Whiting, Indiana, who claimed that she “‘became extremely

---

78. *Id.*

79. *Id.*

80. *Id.* at \*3.

81. *Id.*

82. *Id.* at \*3-4.

83. IND. CODE § 34-20-3-1 (2008).

84. *Carlson*, 2008 U.S. Dist. LEXIS 91878, at \*4.

85. *Id.* at \*9.

86. *Id.* at \*9-11.

87. *Id.* at \*11-12.

88. No. 2:08-CV-271, 2009 U.S. Dist. LEXIS 24807 (N.D. Ind. Mar. 23, 2009).

ill and sickened with Legionnaires disease” while working there.<sup>89</sup> Plaintiff offered various theories of liability, including negligence, negligence per se, nuisance, product liability and “one or more undisclosed ‘Indiana labor law[s].’”<sup>90</sup> Her complaint, however, was vague about exactly what caused her alleged problems: she alleged only that “[m]anufacturer’s [sic] supplied or installed unsafe items, including a water heater/system, plumbing device or other similar item at [her place of employment], which caused or contributed to cause dangerous levels of toxins, contaminants or bacteria . . . to become present [there].”<sup>91</sup> Defendant INEOS and one of its related entities filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, contending that the plaintiff’s allegations failed to identify a product.<sup>92</sup> The court agreed, concluding that the plaintiff had “not alleged that INEOS was a manufacturer or a seller of any product” and that she likewise had “failed to specifically identify a product.”<sup>93</sup> Accordingly, the court dismissed her product liability claim.<sup>94</sup>

#### *D. Defective and Unreasonably Dangerous*

Only products that are in a “defective condition” are subject to IPLA liability.<sup>95</sup> For purposes of the IPLA, a product is in a “defective condition”

if, at the time it is conveyed by the seller to another party, it is in a condition:

- (1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and
- (2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption.<sup>96</sup>

Recent cases confirm that establishing one of the foregoing threshold requirements without the other will not result in liability under the IPLA.<sup>97</sup>

Claimants in Indiana may prove that a product is in a “defective condition” by asserting one or a combination of three theories: (1) the product has a defect in its design (a “design defect”); (2) the product lacks adequate or appropriate warnings (a “warning defect”); or (3) the product has a defect that is the result

---

89. *Id.* at \*2.

90. *Id.* at \*2-3.

91. *Id.* at \*13.

92. *Id.*

93. *Id.* at \*14.

94. *Id.*

95. IND. CODE § 34-20-2-1 (2008); *see also* Westchester Fire Ins. Co. v. Am. Wood Fibers, Inc., No. 2:03-CV-178-TS, 2006 WL 3147710, at \*5 (N.D. Ind. Oct. 31, 2006).

96. IND. CODE § 34-20-4-1 (2008).

97. *See* Baker v. Heye-Am., 799 N.E.2d 1135, 1140 (Ind. Ct. App. 2003) (“[U]nder the IPLA, the plaintiff must prove that the product was in a defective condition that rendered it unreasonably dangerous.” (citing Cole v. Lantis Corp., 714 N.E.2d 194, 198 (Ind. Ct. App. 1999))).



of a malfunction or impurity in the manufacturing process (a “manufacturing defect”).<sup>98</sup>

Although claimants are free to assert any of those three theories for proving that a product is in a “defective condition,” the IPLA provides explicit statutory guidelines identifying when products are not defective as a matter of law. Indiana Code section 34-20-4-3 provides that “[a] product is not defective under [the IPLA] if it is safe for reasonably expectable handling and consumption. If an injury results from handling, preparation for use, or consumption that is not reasonably expectable, the seller is not liable under [the IPLA].”<sup>99</sup> In addition, Indiana Code section 34-20-4-4 provides that “[a] product is not defective under [the IPLA] if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly.”<sup>100</sup>

In addition to the two specific statutory pronouncements identifying when a product is not “defective” as a matter of law, Indiana law also defines when a product may be considered “unreasonably dangerous” for purposes of the IPLA.<sup>101</sup> A product is “unreasonably dangerous” only if its use “exposes the user or consumer to a risk of physical harm . . . beyond that contemplated by the ordinary consumer who purchases [it] with the ordinary knowledge about the product’s characteristics common to the community of consumers.”<sup>102</sup> A product

---

98. See *First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 689 (7th Cir. 2004); *Westchester Fire Ins. Co.*, 2006 WL 3147710, at \*5; *Baker*, 799 N.E.2d at 1140; *Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 161 (Ind. Ct. App. 1997); see also *Troutner v. Great Dane Ltd.*, No. 2:05-CV-040-PRC, 2006 WL 2873430, \*3 (N.D. Ind. Oct. 5, 2006) (confirming that a plaintiff’s product liability claim will fail as a matter of law if he or she does not articulate a legitimate manufacturing, design, or warning defect).

99. IND. CODE § 34-20-4-3 (2008). See also *Hunt v. Unknown Chem. Mfr. No. One*, No. IP 02-389-C-M/S, 2003 U.S. Dist. LEXIS 20138, at \*27-37 (S.D. Ind. Nov. 5, 2003) (holding that homeowner who spread ashes from lumber treated with chromium copper arsenate on his garden could not pursue product liability claim because his use of the lumber was not, legally speaking, foreseeable, intended, or expected).

100. IND. CODE § 34-20-4-4 (2008).

101. See *id.*

102. *Id.* § 34-6-2-146; see also *Baker*, 799 N.E.2d at 1140; *Cole v. Lantis Corp.*, 714 N.E.2d 194, 199 (Ind. Ct. App. 1999). In *Baker*, a panel of the Indiana Court of Appeals wrote that “[t]he question whether a product is unreasonably dangerous is *usually* a question of fact that must be resolved by the jury.” 799 N.E.2d at 1140 (emphasis added) (citing *Vaughn v. Daniels Co.*, 777 N.E.2d 1120, 1128 (Ind. Ct. App. 2002)). Those panels also seem to favor jury resolution in determining “reasonably expected use. Indeed, the *Baker* opinion states that “reasonably expectable use, like reasonable care, involves questions concerning the ordinary prudent person, or in the case of products liability, the ordinary prudent consumer. The manner of use required to establish ‘reasonably expectable use’ under the circumstances of each case is a matter peculiarly within the province of the jury.” *Id.* (citing *Vaughn*, 777 N.E.2d at 1128).

It would seem incorrect, however, to conclude from those pronouncements that there exists something akin to a presumption that juries always *should* resolve whether a product is unreasonably dangerous or whether a use is reasonably expectable. Indeed, recent cases have

is not unreasonably dangerous as a matter of law if it injures in a way or in a fashion that, by objective measure, is known to the community of persons consuming the product.<sup>103</sup>

In cases alleging improper design or inadequate warnings as the theory for proving that a product is in a “defective condition,” recent decisions, including some by Judge Hamilton, have quite clearly recognized that the substantive defect analysis (i.e., whether a design was inappropriate or whether a warning was inadequate) should *follow* a threshold analysis that first examines whether, in fact, the product at issue is “unreasonably dangerous.”<sup>104</sup>

The IPLA provides that liability attaches for placing a product in a “defective condition”<sup>105</sup> in the stream of commerce even though: “(1) the seller has exercised all reasonable care in the manufacture and preparation of the product; and (2) the user or consumer has not bought the product from or entered into any contractual relation with the seller.”<sup>106</sup> What the IPLA bestows, however, in terms of liability despite the exercise of “all reasonable care [i.e., fault],”<sup>107</sup> it then removes for design and warning defect cases, replacing it with a negligence standard:

[I]n an action based on an alleged design defect in the product or based on an alleged failure to provide adequate warnings or instructions regarding the use of the product, the party making the claim must

---

resolved the defective and unreasonably dangerous issue as a matter of law in a design defect context even in the presence of divergent expert testimony. *See, e.g.,* *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 900 (N.D. Ind. 2002) (holding that plaintiff injured when a blade guard on a circular table saw struck him in the eye “wholly failed to show a feasible alternative design that would have reduced the risk of injury”); *see also* *Miller v. Honeywell Int’l, Inc.*, No. IP 98-1742 C-M/S, 2002 U.S. Dist. LEXIS 20478, at \*1-4 (S.D. Ind. Oct. 15, 2002) (finding that Honeywell’s design specifications for planetary gears and gear carrier assembly within the engine of an Army UH-1 helicopter were not defective as a matter of law at the time the specifications were introduced into the stream of commerce).

103. *See Baker*, 799 N.E.2d at 1140; *see also* *Moss v. Crosman Corp.*, 136 F.3d 1169, 1174 (7th Cir. 1998) (finding that a product may be “dangerous” in the colloquial sense, but not “unreasonably dangerous” for purposes of IPLA liability). An open and obvious danger negates liability. “To be unreasonably dangerous, a defective condition must be hidden or concealed [and] ‘evidence of the open and obvious nature of the danger . . . negates a necessary element of the plaintiff’s prima facie case that the defect was hidden.’” *Hughes v. Battenfeld Gloucester Eng’g Co.*, No. TH 01-0237-C T/H, 2003 U.S. Dist. LEXIS 17177, at \*7-8 (S.D. Ind. Aug. 20, 2003) (quoting *Cole v. Lantis Corp.*, 714 N.E.2d 194, 199 (Ind. Ct. App. 1999)).

104. *See Conley v. Lift-All Co.*, No. 1:03-cv-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468, at \*13-14 (S.D. Ind. July 25, 2005) (involving an alleged warnings defect); *Bourne v. Marty Gilman, Inc.*, No. 1:03-cv-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at \*1 (S.D. Ind. July 20, 2005), *aff’d*, 452 F.3d 632 (7th Cir. 2006) (involving an alleged design defect).

105. IND. CODE § 34-20-2-1 (2008).

106. *Id.* § 34-20-2-2.

107. *Id.* § 34-20-2-2(1).



establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.<sup>108</sup>

The statutory language, therefore, imposes a negligence standard in all product liability claims relying upon a design or warning theory to prove defectiveness, while retaining strict liability (liability despite the “exercise of all reasonable care”) only for those claims relying upon a manufacturing defect theory.<sup>109</sup> Despite the IPLA’s unambiguous language and several years worth of authority recognizing that “strict liability” applies only in cases involving alleged manufacturing defects, some courts unfortunately continue to employ the term “strict liability” when referring to IPLA claims. Courts have discussed strict liability even when those claims allege warning and design defects and clearly accrued after the 1995 IPLA amendments took effect.<sup>110</sup>

The IPLA makes clear that, just as in any other negligence case, a claimant advancing design or warning defect theories must satisfy the traditional negligence requirements: duty, breach, injury, and causation.<sup>111</sup> *Kovach v.*

---

108. *Id.* § 34-20-2-2.

109. *See Mesman v. Crane Pro Servs.*, 409 F.3d 846, 849 (7th Cir. 2005) (“Under Indiana’s products liability law, a design defect can be made the basis of a tort suit only if the defect was a result of negligence in the design.”); *First Nat’l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 689 n.4 (7th Cir. 2004) (“Both Indiana’s 1995 statute (applicable to this case) and its 1998 statute abandoned strict liability in design defect and failure to warn cases. Hence, unlike manufacturing defects, for which manufacturers are still held strictly liable, claims of design defect and failure to warn must be proven using negligence principles.”); *Conley*, 2005 U.S. Dist. LEXIS 15468, at \*12-13 (“The IPLA effectively supplants [the plaintiff’s] common law claims because all of his claims are brought by a user or consumer against a manufacturer for physical harm caused by a product. Plaintiff’s common law claims will therefore be treated as merged into the IPLA claims.”); *Bourne*, 2005 U.S. Dist. LEXIS 15467, at \*9 n.2 (“[P]laintiffs may not pursue a separate common law negligence claim [for design defect]. Their negligence claim is not dismissed but is more properly merged with the statutory claim under the IPLA, which includes elements of negligence.”); *see also* *Miller v. Honeywell Int’l, Inc.*, No. IP 98-1742 C-M/S, 2002 U.S. Dist. LEXIS 20478, at \*37-38 (S.D. Ind. Oct. 15, 2002); *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 899-900 (N.D. Ind. 2002); *Birch ex rel. Birch v. Midwest Garage Door Sys.*, 790 N.E.2d 504, 518 (Ind. Ct. App. 2003).

110. *See, e.g., Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995); *Burt*, 212 F. Supp. 2d at 900; *see also* *Fellner v. Phila. Toboggan Coasters Inc.*, No. 3:05-CV-218-SEB-WGH, 2006 WL 2224068, at \*1, 3-4 (S.D. Ind. Aug. 2, 2006); *Cincinnati Ins. Cos. v. Hamilton Beach/Proctor-Silex, Inc.*, No. 4:05 CV 49, 2006 WL 299064, at \*2-3 (N.D. Ind. Feb. 7, 2006); *Vaughn v. Daniels Co.*, 841 N.E.2d 1133, 1138-39 (Ind. 2006).

111. *E.g., Conley*, 2005 U.S. Dist. LEXIS 15468, at \*13-14 (“To withstand summary judgment, [the plaintiff] must come forward with evidence tending to show: (1) [the defendant] had a duty to warn the ultimate users of its sling that dull or rounded load edges could cut an unprotected sling; (2) the hazard was hidden and thus the sling was unreasonably dangerous; (3) [the defendant] failed to exercise reasonable care under the circumstances in providing warnings;

*Caligor Midwest*,<sup>112</sup> a case decided during the 2009 survey period, nicely illustrates that point. Indeed, perhaps no Indiana decision has better articulated the concept that plaintiffs must establish all negligence elements, including causation, as a matter of law in a product liability case to survive summary disposition. In *Kovach*, a nine-year-old boy was diagnosed with enlarged nasal tissue that caused a variety of complications.<sup>113</sup> He underwent surgery for the condition and following the procedure was prescribed 15 milliliters (mL) of acetaminophen with codeine for pain relief.<sup>114</sup> After the surgery, a nurse gave the boy the medicine in a translucent medicine cup with translucent interior markings for measuring liquids.<sup>115</sup> The nurse was familiar with the medicine cup she used, had used it frequently before, and understood how to interpret its markings.<sup>116</sup> She claimed that she filled the cup halfway and gave the boy 15 mL of the drug as prescribed, but the child's father, who was in the room, testified that the cup was full.<sup>117</sup>

After being discharged and returning home, the boy went into respiratory arrest and was transported to a hospital, where he died from asphyxia.<sup>118</sup> An autopsy revealed that the boy had died of an opiate overdose.<sup>119</sup> At the time of his death, his blood contained more than twice the recommended therapeutic level of codeine.<sup>120</sup>

The boy's parents sued, among others, the manufacturers and distributors of the medicine cup (the "Cup Defendants") under theories of negligence and strict liability under the IPLA, breach of implied warranty of merchantability, and implied warranty of fitness for a particular purpose.<sup>121</sup> The parents claimed that their son's codeine overdose resulted from imprecise markings on the medicine cup.<sup>122</sup>

The Cup Defendants successfully moved for summary judgment.<sup>123</sup> One of their arguments was that no causal connection existed between the alleged defects in the cup and the child's codeine overdose.<sup>124</sup> The plaintiffs offered opinion testimony from an associate professor of pharmacology who had

---

and (4) [the defendant's] alleged failure to provide adequate warnings was the proximate cause of his injuries.") (citations omitted).

112. 913 N.E.2d 193 (Ind. 2009), *reh'g denied*, No. 49S04-0902-CV-88, 2009 Ind. LEXIS 1514 (Ind. Dec. 3, 2009).

113. *Id.* at 195.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 195-96.

122. *Id.* at 196.

123. *Id.* at 196, 200.

124. *Id.* at 196.



analyzed the cup and determined that it was not suitable for measuring and dispensing precise doses of medication.<sup>125</sup> That opinion testimony estimated that measurements performed using the medicine cup posed a twenty percent to thirty percent chance of error. The professor concluded that any of the cup's volume measurements would have a twenty percent to thirty percent margin of error.<sup>126</sup> The Cup Defendants tried unsuccessfully to exclude the plaintiff's opinion witness.<sup>127</sup>

The plaintiffs appealed the entry of summary judgment for the Cup Defendants and the Cup Defendants cross-appealed the denial of their motion to exclude the plaintiffs' opinion testimony.<sup>128</sup> The court of appeals reversed the entry of summary judgment, determining that the trial court did not err in admitting and considering the opinion witness's affidavit.<sup>129</sup> Chief Judge Baker dissented from the majority opinion, opining that the plaintiffs had failed to establish that a defect in the cup was the proximate cause of their son's death.<sup>130</sup>

The Indiana Supreme Court agreed with Chief Judge Baker's dissent, finding no causal connection between the alleged design and warning defects and the overdose.<sup>131</sup> The *Kovach* court reasoned that "proximate cause" consisted of both factual causation and scope of liability.<sup>132</sup> The court noted that "[t]o establish factual causation, the plaintiff must show that but for the defendant's allegedly tortious act or omission, the injury at issue would not have occurred."<sup>133</sup> For the scope of liability doctrine, the question is "whether the injury was a natural and probable consequence of the defendant's conduct, which in the light of the circumstances, should have been foreseen or anticipated."<sup>134</sup> Courts impose liability only in when the ultimate injury was a reasonably foreseeable consequence of the defendant's tortious act or omission.<sup>135</sup> The court then wrote that even though causation-in-fact is ordinarily a factual question for the jury, the issue can become a question of law to be resolved by the court "where reasonable minds cannot disagree as to causation-in-fact."<sup>136</sup>

Although the Indiana Supreme Court acknowledged that witness testimony conflicted about whether the medicine cup was half full or full, it did not find this

---

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* For a full analysis and discussion of the court of appeals's decision, see Alberts et al., *supra* note 41, at 1118-23, 1141-42.

130. *Kovach*, 913 N.E.2d at 196.

131. *Id.* at 198-99.

132. *Id.* at 197 (citing *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1243-44 (Ind. 2003)).

133. *Id.* at 197-98 (citing *City of Gary*, 801 N.E.2d at 1243-44).

134. *Id.* at 198 (citing *City of Gary*, 801 N.E.2d at 1244).

135. *Id.*

136. *Id.* (citing *Peters v. Forster*, 804 N.E.2d 736, 743 (Ind. 2004)).

dispute convincing.<sup>137</sup> The boy was prescribed 15 mL of acetaminophen with codeine, half the volume of the cup.<sup>138</sup> A full cup would have contained twice as much pain reliever, approximately 30 mL.<sup>139</sup> The cup was translucent, and the medicine at issue was red.<sup>140</sup> The nurse administering the medication knew that she was to dispense a half cup (15 mL) and anyone who saw the cup would have been able to see whether it was half full or full.<sup>141</sup> Moreover, the boy's father testified that he observed the nurse give the boy a full cup of the medicine and an autopsy revealed that the boy had twice the therapeutically indicated amount of codeine in his blood.<sup>142</sup> The court concluded that imprecise measurements on the dosing cup did not cause the boy's tragic death was not caused by imprecise measurements on the dosing cup, but instead by the fact that he received a double dose of codeine.<sup>143</sup> The court declined to attribute his death to any design defect in the cup.<sup>144</sup>

The Indiana Supreme Court declined to address whether a warning against the cup's use for precise measurements was needed in the case at hand or in other circumstances because even had the warning been given, it would not have prevented the boy's death.<sup>145</sup> The court discussed the court of appeals use of the "read-and-heed" presumption to establish causation and concluded that the presumption did not eliminate the need to prove causation in failure-to-warn cases.<sup>146</sup> The court wrote that, "[t]he most the presumption does is establish that a warning would have been read and obeyed. It does not establish that the defect in fact caused the plaintiff's injury."<sup>147</sup> The plaintiff still must establish causation by showing "that the danger that would have been prevented by an appropriate warning was the danger that materialized in the plaintiff's case."<sup>148</sup> If the "read-and-heed" presumption had been applied, then the court would assume the surgical nurse "would have read such a warning and chosen a precision applicator to administrate the codeine."<sup>149</sup> But the boy's death still would have occurred because a double dose of codeine caused the death, not just an imprecise dose.<sup>150</sup> In other words, the type of harm the warning targeted did

---

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 199.

147. *Id.*

148. *Id.* (citing 2 DAN D. DOBBS, *THE LAW OF TORTS* § 367 (2001); 1 DAVID G. OWEN ET AL., *MADDEN & OWEN ON PRODUCTS LIABILITY* § 9:11 (3d ed. 2000)).

149. *Id.*

150. *Id.*



not cause the boy's death.<sup>151</sup>

This Survey also addresses in detail a handful of cases in which plaintiffs attempted to demonstrate that products were defective and unreasonably dangerous under theories of warning, design, and manufacturing defect.

1. *Warning Defect Theory*.—The IPLA contains a specific statutory provision covering the warning defect theory, which reads as follows:

A product is defective . . . if the seller fails to:

- (1) properly package or label the product to give reasonable warnings of danger about the product; or
- (2) give reasonably complete instructions on proper use of the product; when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the user or consumer.<sup>152</sup>

In failure to warn cases, the “unreasonably dangerous” inquiry is essentially the same as the requirement that the defect be latent or hidden.<sup>153</sup>

Federal and state courts in Indiana have been busy in recent years when addressing issues in cases involving allegedly defective warnings and instructions. Some of those cases include: *Deaton v. Robison*,<sup>154</sup> *Clark v.*

---

151. *Id.*

152. IND. CODE § 34-20-4-2 (2008); *see also* *Deaton v. Robison*, 878 N.E.2d 499, 501-03 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 49 (Ind. 2008); *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522, 527 (Ind. Ct. App. 2004) (both noting the standard for proving a warning defect case).

153. *See* *First Nat'l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682, 690 n.5 (7th Cir. 2004). For a more detailed analysis of *Inlow II*, *see* Joseph R. Alberts, *Survey of Recent Developments in Indiana Product Liability Law*, 38 IND. L. REV. 1205, 1221-27 (2005).

154. 878 N.E.2d 499 (Ind. Ct. App. 2007), *trans. denied*, 891 N.E.2d 49 (Ind. 2008). In *Deaton*, the Indiana Court of Appeals affirmed the trial court's judgment in favor of the manufacturer of a black powder rifle that the plaintiff alleged to be defective and unreasonably dangerous. *Id.* at 500-01. The court concluded that the rifle was not an unreasonable or concealed hazard for purposes of the IPLA, but rather, a manifest and obvious risk that the plaintiffs appreciated. *Id.* at 503-04. For a more complete discussion of *Deaton*, *see* Alberts et al., *supra* note 41, at 1110-14.

Practitioners and judges in Indiana . . . should be mindful that application of the “open and obvious” concept can be used in at least two different ways: (1) in determining whether a product is “unreasonably dangerous” because unreasonable danger depends upon the reasonable expectations of expected users and the obviousness of the risk will eliminate the need for any further protective measures; and (2) in determining whether the “incurred risk” defense applies.

*Id.* at 1114 (footnotes omitted); *see also* IND. CODE § 34-20-6-3 (2008).

Practitioners and judges in Indiana should also recognize that *Deaton* . . . analyzed the openness and obviousness of a product's condition and ultimately concluded, as a matter of law, that the products at issue did not present an unreasonable, concealed hazard. Whether the same decision would have been reached as a matter of law in the context of the “incurred risk” statutory defense is a more difficult question because the defense requires a defendant to establish that the user actually knew about the product's

*Oshkosh Truck Corp.*,<sup>155</sup> *Ford Motor Co. v. Rushford*,<sup>156</sup> *Tober v. Graco Children's Products, Inc.*,<sup>157</sup> *Williams v. Genie Industries, Inc.*,<sup>158</sup> *Conley v. Lift-All Co.*,<sup>159</sup> *First National Bank & Trust Corp. v. American Eurocopter Corp. (Inlow II)*,<sup>160</sup> and *Birch v. Midwest Garage Door Systems*.<sup>161</sup>

---

danger.

Alberts et al., *supra* note 41, at 1114; *see also* IND. CODE §§ 34-20-6-3(1)-(2) (2008). No such requirement exists when the "open and obvious" concept is used to support the argument that a product is not unreasonably dangerous because of the open and obvious nature of the danger it presents. The latter is based upon a "reasonable user expectation" standard, not an actual knowledge standard. Alberts et al., *supra* note 41, at 1114.

155. No. 1:07-cv-0131-LJM-JMS, 2008 WL 2705558 (S.D. Ind. July 10, 2008). The *Clark* court precluded a repossession agent who suffered injuries when he slipped raised rollback bed of the truck he used from pursuing a failure-to-warn claim against the truck manufacturer. *Id.* at \*4. The court concluded that the manufacturer had no duty to warn of any dangers associated with the rollback bed's open and obvious condition because, among other things, the agent was aware of the bed's slick nature. *Id.* The court did, however, conclude that he had designated enough evidence to pursue claims that the manufacturer failed to provide adequate instructions on how to operate the rollback bed. *Id.* at \*5. *Clark* may prove troublesome to those trying to interpret and apply it because the court allowed the plaintiffs to proceed to trial on a failure to instruct theory despite having made an initial determination that the slippery truck bed and the risk of falling on it was obvious and did not present an unreasonably dangerous condition. The IPLA and recent case law suggest that the better approach for courts to take is to first determine whether the defective condition from which the product allegedly suffers would, as a matter of law and under all relevant circumstances, thereby also render it unreasonably dangerous. *E.g.*, *Bourne v. Marty Gilman, Inc.*, 452 F.3d 632, 636-37 (7th Cir. 2006). If not, the inquiry should be at an end even if it is possible that a plaintiff could present sufficient evidence to defeat summary judgment concerning whether the product could be said to be in a "defective condition." *Id.* at 635. In that context, the *Clark* decision is peculiar because it reached the conclusion that the defective condition (the slippery rollback bed) did not render the truck unreasonably dangerous as a matter of law, yet the court nevertheless resurrected the plaintiffs' claim because there was arguably sufficient evidence to demonstrate that the manufacturer's use instructions could have been better. *Clark*, 2008 WL 2705558, at \*4-5. For a more detailed discussion on these and related issues, *see* Alberts et al., *supra* note 41, at 1114-18.

156. 868 N.E.2d 806 (Ind. 2007). For a more detailed discussion and commentary about *Rushford*, *see* Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 41 IND. L. REV. 1165, 1184-87 (2008).

157. 431 F.3d 572 (7th Cir. 2005). For more detailed discussion and commentary about *Tober*, *see* Joseph R. Alberts & James Petersen, *Survey of Recent Developments in Indiana Product Liability Law*, 40 IND. L. REV. 1007, 1028-30 (2007).

158. No. 3:04-CV-217 CAN, 2006 WL 1408412 (N.D. Ind. May 19, 2006). For more detailed discussion and commentary about *Williams*, *see* Alberts & Petersen, *supra* note 157, at 1032-33.

159. No. 1:03-cv-01200-DFH-TAB, 2005 U.S. Dist. LEXIS 15468 (S.D. Ind. July 25, 2005).

160. *First Nat'l Bank & Trust Corp. v. Am. Eurocopter Corp. (Inlow II)*, 378 F.3d 682 (7th Cir. 2004). In the *Inlow* case, a helicopter rotor blade struck and killed the Conesco general counsel, Lawrence Inlow, as he passed in front of the helicopter after disembarking. *Id.* at 685.



The 2009 survey period produced additional cases involving warning defect theories that merit discussion here. First, in *Cook v. Ford Motor Co.*,<sup>162</sup> the plaintiffs filed suit against Ford after their daughter suffered a serious brain injury when the front passenger side air bag in the family's 1997 F-150 pickup truck deployed during an accident.<sup>163</sup> The air bag at issue could be manually disabled.<sup>164</sup> The plaintiffs claimed that their daughter's injury resulted from defective instructions and warnings concerning the air bag and its deactivation switch.<sup>165</sup>

The injured girl's mother was the primary driver of the vehicle and, before the collision, had read neither the owner's manual nor any of the warnings inside the vehicle.<sup>166</sup> The injured girl's father had reviewed a section of the owner's manual explaining how and when to engage the four-wheel drive and deactivate the front passenger side air bag.<sup>167</sup> At the top of one of the pages in the owner's manual was a colored box marked with a triangle and an exclamation point contained the following language: "Keep the passenger air bag turned on unless there is a rear-facing infant seat installed in the front seat. When the passenger air bag switch is turned off, the passenger air bag will not inflate in a

---

The Seventh Circuit Court of Appeals held that the manufacturer satisfied its duty to warn Conseco and Inlow as a matter of law in light of the sophisticated intermediary doctrine. *Id.* at 692-93.

161. 790 N.E.2d 504 (Ind. Ct. App. 2003). In *Birch*, a young girl sustained serious injuries when a garage door closed on her. *Id.* at 508. The court concluded that the garage door system at issue was not defective and that a change to an applicable federal safety regulation, in and of itself, does not make a product defective. *Id.* at 515, 518-19. Additionally, the court concluded that there was no duty to warn the plaintiffs about changes to federal safety regulations because the system manual the plaintiffs received included numerous warnings about the type of system installed and that no additional information would have added to the plaintiffs' understanding of the product. *Id.* at 516, 518-19. For a more detailed analysis of *Birch*, see Joseph R. Alberts & Jason K. Bria, *Survey of Recent Developments in Product Liability Law*, 37 IND. L. REV. 1247, 1262-64 (2004); see also *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 895-96 (N.D. Ind. 2002) (rejecting plaintiff's argument that a saw should have had warning labels, making it more difficult for the saw guard to be left in a position where it appeared installed when in fact it was not); *McClain v. Chem-Lube Corp.*, 759 N.E.2d 1096 (Ind. Ct. App. 2001) (holding that the trial court should have addressed whether the risks associated with use of a product were unknown or unforeseeable and whether the defendants had a duty to warn of the product's inherent dangers, because evidence showed that both defendants knew that the product at issue was to be used at high temperatures during welding), *disapproved by Shultz v. Ford Motor Co.*, 857 N.E.2d 977 (Ind. 2006). For a more detailed analysis of *Burt* and *McClain*, see Alberts & Boyers, *supra* note 35, at 1183-85.

162. 913 N.E.2d 311 (Ind. Ct. App. 2009), *trans. denied*, No. 49A02-0802-CV-130, 2010 Ind. LEXIS 184 (Ind. Feb. 25, 2010).

163. *Id.* at 315.

164. *Id.* at 316.

165. *Id.* at 315.

166. *Id.* at 316.

167. *Id.*

collision.”<sup>168</sup> After reading this page, the girl’s father believed that the only time the front passenger side air bag needed to be deactivated was when a child sat in a rear facing child seat in the front seat.<sup>169</sup> Like his wife, he never read the warning on the sun visor that read:

WARNING TO AVOID SERIOUS INJURY:

For maximum safety protection in all types of crashes, you must always wear your safety belt.

Do not install rearward-facing child seats in any front passenger seat position, unless the air bag is off.

Do not sit or lean unnecessarily close to the air bag.

Do not place any objects over the air bag or between the air bag and yourself.

See the Owner’s Manual for further information and explanations.<sup>170</sup>

In addition to the aforementioned warnings that neither of the girl’s parents examined, the owner’s manual also contained warnings and information in the section “Seating and safety restraints.”<sup>171</sup> This section instructed all occupants to wear safety belts and ensure that children be seated where they could be properly restrained to prevent risk of injury.<sup>172</sup> Another page of the owner’s manual read, “if possible, place children in the rear seat of your vehicle. Accident statistics suggest that children are safer when properly restrained in rear seating positions than when they are restrained in front seating positions.”<sup>173</sup>

At the time of the accident, the girl was riding in the front seat of the truck, her two-year-old brother secured in a car seat in the back seat.<sup>174</sup> Before the collision, the girl had unbuckled her seat belt, leaving her unrestrained when the truck was rear-ended.<sup>175</sup> The girl sustained major head trauma when the front air bag deployed.<sup>176</sup>

The plaintiffs presented their claims against Ford to a jury for several days.<sup>177</sup> Before the trial’s conclusion, Ford moved for a directed verdict and requested a mistrial.<sup>178</sup> The court granted Ford’s motion for a mistrial and scheduled a second trial.<sup>179</sup> Before the second trial, the court granted Ford’s motion for

---

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 316-17. “[E]ach warning is in a colored box marked with an exclamation point inside a triangular symbol.” *Id.* at 317.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 317-18.

178. *Id.* at 318.

179. *Id.*



summary judgment with respect to the failure to warn claim and, thereafter, entered final judgment.<sup>180</sup>

The Indiana Court of Appeals reversed, concluding that a manufacturer's duty to warn encompasses both a duty to provide instructions for the safe use of a product, and a duty to provide a warning about the inherent dangers of improper use of the product.<sup>181</sup> The *Cook* court then noted that a negligence standard governed warning and instruction defect claims under the IPLA and, consequently, a party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances.<sup>182</sup>

After first determining that federal law does not preempt plaintiff's warning and instruction claims, the court of appeals turned to the adequacy of Ford's warnings and instructions.<sup>183</sup> Plaintiffs claimed that the trial court erred when it granted Ford's motion for summary judgment because there were factual questions concerning whether the owner's manual instructions and warnings were defective and caused the girl's injury.<sup>184</sup> Relying on Indiana's read-and-heed presumption,<sup>185</sup> Ford countered that the parents' failure to read the warnings and instructions contained in the owner's manual defeated their claims.<sup>186</sup> The court did not agree.<sup>187</sup>

Initially, the court noted that there was no doubt that Ford owed a duty to provide warnings about the truck's air bags.<sup>188</sup> Ford's warning in the owner's manual instructed owners to leave the front passenger side air bag on unless a rear facing child seat was in the front seat.<sup>189</sup> The plaintiffs designated opinion testimony that air bags posed a danger to all children in the front seat, not just those in rear-facing child seats, as well as testimony from a Ford engineer suggesting that Ford was aware as early as the mid-1990s that airbags posed a danger to children.<sup>190</sup> Further, the girl's father testified that he was aware of Ford's directive to deactivate the air bag if a rear facing child seat was placed in the front seat, but all of the other instructions in the owner's manual (which he

---

180. *Id.*

181. *Id.* at 319, 331 (citing *Rushford v. Ford Motor Co.*, 868 N.E.2d 806, 810 (Ind. 2007)).

182. *Id.* at 319-20 (quoting IND. CODE § 34-20-2-2 (2008)).

183. A substantial portion of the court's analysis addresses whether federal law preempts the plaintiffs' claims. We address that portion of the court's decision concerning federal preemption in Part IV, *infra*.

184. *Cook*, 913 N.E.2d at 326.

185. "[W]here [a] warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in [sic] defective condition, nor is it unreasonably dangerous." *Id.* at 326, n. 8 (quoting *Dias v. Daisy-Heddon*, 390 N.E.2d 222, 225 (1979) (quoting RESTATEMENT (SECOND) OF TORTS § 402A, cmt. j (1976)).

186. *Id.* at 326 n.8.

187. *Id.* at 326-31.

188. *Id.* at 326.

189. *Id.*

190. *Id.*

read after the accident) would not have altered his conduct because none of them would have contradicted his belief that the air bag provided greater protection to a front seat occupant.<sup>191</sup>

The court of appeals pointed out that whether an act or omission is a breach of a duty is often a question of fact reserved for a jury.<sup>192</sup> Even if the court employed the read-and-heed presumption, the owner's manual directed users to leave the air bag on unless a rear facing child seat was placed in the front seat.<sup>193</sup> The parents testified that the other warnings and instructions contained in the owner's manual would not have altered their conduct because these warnings did not alert them to the dangers air bags posed to children seated in the front seat. This testimony, coupled with Ford's use of permissive language in other instructions (such as to place children in the rear seat if possible), lead the court to conclude that a jury should decide whether Ford's warnings were adequate.<sup>194</sup>

The court next addressed proximate cause.<sup>195</sup> Plaintiffs claimed that "but for" Ford's failure to instruct them to deactivate the air bag for all child passengers or to specifically warn about the dangers the air bag posed to children, their daughter's injury would not have occurred.<sup>196</sup> Ford, on the other hand, claimed that the instructions were not the proximate cause of the injury because had the parents read and heeded the instructions to place their daughter in the back seat and to remain belted at all times, her injuries either would not have occurred or would not have been as severe.<sup>197</sup> Neither party disputed that the child's injury would not be as severe had she remained belted.<sup>198</sup> Similarly, neither party disputed that the girl's injuries would not have occurred at all had she been in the back seat.<sup>199</sup> Nonetheless, again because the court believed the language Ford employed in its warnings was permissive (directing owners to place children in the back seat "if possible") the court concluded that a question of fact remained for the jury to decide whether the failure to place the girl in the back seat was a reasonably foreseeable intervening cause.<sup>200</sup>

*Gibbs v. I-Flow, Inc.*,<sup>201</sup> is another warnings defect case decided during the 2009 survey period that deserves some detailed analysis. In *Gibbs*, the court discussed the learned intermediary doctrine in the context of a motion to remand to state court.<sup>202</sup> The plaintiff brought a failure to warn claim after a pain pump manufactured by I-Flow and sold by a sales representative Rowland allegedly

---

191. *Id.* at 326-27.

192. *Id.* at 327.

193. *Id.* at 327-28.

194. *Id.*

195. *Id.* at 328.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 330-31.

201. No. 1:08-cv-708-WTL-TAB, 2009 U.S. Dist. LEXIS 14895 (S.D. Ind. Feb. 24, 2009).

202. *Id.* at \*12.



injured him.<sup>203</sup> The defendants argued that the plaintiffs fraudulently joined Rowland to defeat diversity.<sup>204</sup> The defendants claimed that under the learned intermediary doctrine, the plaintiff could not succeed on a claim against Rowland because the plaintiff's physician was an intermediary who should have recognized the danger and warned the plaintiff accordingly.<sup>205</sup> The learned intermediary doctrine provides that "there is no duty to warn when a product is sold to a 'knowledgeable or sophisticated intermediary' whom the manufacturer has warned."<sup>206</sup> But "the intermediary must have knowledge or sophistication equal to that of the manufacturer, and the manufacturer must be able to rely reasonably on the intermediary to warn the ultimate consumer."<sup>207</sup> The plaintiff argued that Rowland knew about the risks of the pain pump but failed to inform the plaintiff's doctor of these risks.<sup>208</sup> The plaintiff also claimed that Rowland misrepresented the facts regarding the risks.<sup>209</sup> Based upon these allegations, the court could not conclude that the learned intermediary doctrine would bar plaintiff's claims against Rowland; thus, remand was appropriate.<sup>210</sup>

2. *Design Defect Theory*.—Decisions that address substantive design defect allegations in Indiana require plaintiffs to prove the existence of what practitioners and judges often refer to as a safer, feasible alternative design.<sup>211</sup> Plaintiffs must demonstrate that another design not only could have prevented the injury, but that the alternative design was effective, safer, more practicable, and more cost-effective than the one at issue.<sup>212</sup> One panel of the Seventh Circuit (Judge Easterbrook writing) described that "a design defect claim in Indiana is a negligence claim, subject to the understanding that negligence means failure to take precautions that are less expensive than the net costs of accidents."<sup>213</sup> Phrased in a slightly different way, "[t]he [p]laintiff bears the burden of proving a design to be unreasonable, and must do so by showing there are other safer alternatives, and that the costs and benefits of the safer design make it unreasonable to use the less safe design."<sup>214</sup>

---

203. *Id.* at \*2.

204. *Id.* at \*3.

205. *Id.* at \*12-14.

206. *Id.* at \*12 (quoting *Taylor v. Monsanto Co.*, 150 F.3d 806, 808 (7th Cir. 1998)).

207. *Id.* (quoting *Taylor*, 150 F.3d at 808).

208. *Id.* at \*13.

209. *Id.*

210. *Id.* at \*13-14.

211. In cases alleging improper design to prove that a product is in a "defective condition," the substantive defect analysis may need to follow a threshold "unreasonably dangerous" analysis if one is appropriate. *See, e.g., Bourne v. Marty Gilman, Inc.*, No. 1:03-cv-01375-DFH-VSS, 2005 U.S. Dist. LEXIS 15467, at \*10-20 (S.D. Ind. July 20, 2005), *aff'd*, 452 F.3d 632 (7th Cir. 2006).

212. *See Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995); *Burt v. Makita USA, Inc.*, 212 F. Supp. 2d 893, 900 (N.D. Ind. 2002).

213. *McMahon v. Bunn-o-matic Corp.*, 150 F.3d 651, 657 (7th Cir. 1998).

214. *Westchester Fire Ins. Co. v. Am. Wood Fibers, Inc.*, No. 2:03-CV-178-TS, 2006 WL 3147710, at \*5 (N.D. Ind. Oct. 31, 2006) (citing *Bourne*, 452 F.3d at 638). Another recent Seventh

Indiana's requirement of proof of a safer, feasible alternative design is similar to what a number of other states require in the design defect context. Indeed, that requirement is reflected in Section 2(b) of the Restatement (Third) of Torts and the related comments.<sup>215</sup>

In the specific context of the IPLA, it is clear that design defects in Indiana are judged using a negligence standard.<sup>216</sup> As such, a claimant can hardly find a manufacturer negligent for adopting a particular design unless he or she can prove that a reasonable manufacturer in the exercise of ordinary care would have adopted a different and safer design. The claimant must prove that the safer, feasible alternative design was in fact available and that the manufacturer unreasonably failed to adopt it.<sup>217</sup>

In addition, the IPLA adopts "comment k" of the Restatement (Second) of Torts for all products and, by statute, "[a] product is not defective . . . if the product is incapable of being made safe for its reasonably expectable use, when manufactured, sold, handled, and packaged properly."<sup>218</sup> Thus, a manufacturer technically cannot make the "comment k" statutory defense available until and unless the claimant demonstrates a rebuttal. That raises interesting questions in light of Indiana's quirky treatment of Trial Rule 56 under *Jarboe v. Landmark Community Newspapers of Indiana, Inc.*<sup>219</sup> In federal court, under a *Celotex*<sup>220</sup> standard, a manufacturer may file for summary judgment based upon the "comment k" defense, challenging the claimant to rebut the defense through properly designated proof of feasible alternative design.<sup>221</sup> Under Indiana's treatment of Rule 56, however, the manufacturer bears the burden of affirmatively showing the unavailability of the safer, feasible alternative design.<sup>222</sup> Regardless of the procedure governing the motion itself, the claimant still must prove the existence of a safer, feasible alternative design to rebut the

---

Circuit case postulates that a design defect claim under the IPLA requires applying the classic formulation of negligence:  $B [\text{burden of avoiding the accident}] < P [\text{probability of the accident that the precaution would have prevented}] L [\text{loss that the accident if it occurred would cause}]$ . See *Bourne*, 452 F.3d at 637; see also *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (explaining Judge Learned Hand's articulation of the " $B < PL$ " negligence formula).

215. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(B) (1998).

216. IND. CODE § 34-20-2-2 (2008); see also *Bourne*, 452 F.3d at 637; *Westchester Fire*, 2006 WL 3147710, at \*5.

217. To excuse that requirement would be tantamount to excusing the reasonable care statutory component of design defect liability. By way of example, a manufacturer could not be held liable under the IPLA for adopting design "A" unless there was proof that through reasonable care the manufacturer would have instead adopted design "B." To make that case, a claimant must show the availability of design "B" as an evidentiary predicate to establish before proceeding to the other "reasonable care" elements.

218. IND. CODE § 34-20-4-4 (2008).

219. 644 N.E.2d 118, 123 (Ind. 1994).

220. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

221. *Id.* at 324.

222. See IND. TRIAL R. 56.



IPLA's "comment k" defense.<sup>223</sup>

The Indiana Supreme Court in *Schultz v. Ford Motor Co.*<sup>224</sup> endorsed the foregoing burden of proof analysis in design defect claims in Indiana.<sup>225</sup> State and federal courts applying Indiana law have issued several important decisions in recent years that address design defect claims.<sup>226</sup> The 2009 survey period added to the scholarship in this area.

Perhaps one of the most significant design defect cases decided in recent years and certainly during this Survey period, *Ford Motor Co. v. Moore*,<sup>227</sup> may prove to be fleeting guidance because the Indiana Supreme Court granted transfer on September 11, 2009.<sup>228</sup> Nonetheless, the decision is noteworthy because of the court's collection, analysis, and summary of Indiana law in design defect cases. In *Moore*, the driver and sole occupant of 1997 Ford Explorer died when the vehicle's left front tire tread separated.<sup>229</sup> Despite wearing a properly

---

223. See, e.g., *Bourne v. Marty Gilman, Inc.*, 452 F.3d 632, 637 (7th Cir. 2006); *McMahon v. Bunn-o-matic Corp.*, 150 F.3d 651, 657 (7th Cir. 1998); *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995); *Westchester Fire Ins. Co. v. Am. Wood Fibers, Inc.*, No. 2:03-CV-178-TS, 2006 WL 3147710, at \*5 (N.D. Ind. Oct. 31, 2006); *Burt v. Makita USA, Inc.*, 912 F. Supp. 2d 893, 900 (N.D. Ind. 2002).

224. 857 N.E.2d 977 (Ind. 2006).

225. *Id.* at 985 n.12 ("For a discussion of the burden of proof at summary judgment in a design defect claim, see Joseph R. Alberts et al., *Survey of Recent Developments in Indiana Product Liability Law*, 39 IND. L. REV. 1145, 1158-60 (2006).").

226. See, e.g., *Mesman v. Crane Pro Servs.*, 512 F.3d 352, 359 (7th Cir. 2008) (holding that reversal not required even though jury instruction was confusing and, at least in part, inaccurate in a case alleging design defects against defendant company hired to rebuild a fifty-one-year-old crane); *Bourne*, 452 F.3d 632, 633, 638-39 (holding that a football goal post that fell and injured a college student during a post-game celebration was not unreasonably dangerous as a matter of law); *Westchester Fire*, 2006 WL 3147710, at \*5 (dismissing design defect claim based on allegations that a defectively designed wood flour product spontaneously combusted and caused a fire because the plaintiff presented no evidence showing there was a safer, reasonably feasible alternative); *Fueger v. CNH Am. LLC*, 893 N.E.2d 330, 333 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1233 (Ind. 2008) (holding that plaintiff's expert was qualified to render opinions about the skid loader's allegedly defective design and that plaintiff had designated sufficient evidence to defeat summary judgment as to design defect issue); *Lytle v. Ford Motor Co.*, 814 N.E.2d 301, 317-18 (Ind. Ct. App. 2004) (holding, *inter alia*, that the theories offered by plaintiffs' opinion witnesses regarding the inadvertent unlatching of a seatbelt were not reliable and that designated evidence failed to show that Ford's seatbelt design was defective or unreasonably dangerous); *Baker v. Heye-Am.*, 799 N.E.2d 1135, 1143-44 (Ind. Ct. App. 2003) (holding that fact issues precluded summary judgment with respect to whether the placement of, and lack of a guard for, a maintenance stop button rendered a glass molding machine defective or unreasonably dangerous or both).

227. 905 N.E.2d 418 (Ind. Ct. App.), *trans. granted, opinion vacated*, 919 N.E.2d 552 (Ind. 2009).

228. *Ford Motor Co. v. Moore*, 919 N.E.2d 552 (table) (Ind. 2009).

229. *Ford Motor Co.*, 905 N.E.2d at 421.

fastened seat belt,<sup>230</sup> the driver was ejected through the vehicle's sunroof that was closed and latched before the collision.<sup>231</sup> The driver's estate sued the tire manufacturer, the vehicle's seller, Ford, and TRW Vehicle Safety Systems, Inc.<sup>232</sup> The seller and tire manufacturer settled before trial.<sup>233</sup>

The driver's estate claimed that the Explorer was negligently designed in several ways. Ford and TRW claimed that the driver's death was the result of the severe nature of the crash.<sup>234</sup> Ford and TRW also relied on Indiana's rebuttable presumption<sup>235</sup> that the product was not defective and they were not negligent because the seat belt assembly and sunroof designs complied with applicable government regulations and were state-of-the-art.<sup>236</sup> The court instructed the jury that it could return a verdict against Ford if it found that Ford "[had] placed into the stream of commerce a defectively designed, unreasonably dangerous product and was negligent in the design of the product, with that product being either the seatbelt assembly or the sunroof."<sup>237</sup> A similar instruction was given about TRW, but TRW's product was defined as "being the seatbelt assembly."<sup>238</sup> The jury returned a verdict against Ford and apportioned fault. Ford and TRW appealed, challenging the sufficiency of the estate's design defect evidence.<sup>239</sup>

The Indiana Court of Appeals began its analysis by acknowledging that the IPLA governed the estate's claims and that a negligence standard applied.<sup>240</sup> As a result, the estate had to establish the existence of a duty, breach of that duty, and an injury resulting from the breach.<sup>241</sup> In other words, the estate had to establish Ford and TRW failed to exercise reasonable care under the circumstances.<sup>242</sup> The event that caused the collision was a tire failure.<sup>243</sup> Nonetheless, the crashworthiness doctrine would allow the estate to recover if a design defect (seat belt assembly or sunroof) caused or enhanced the driver's injuries.<sup>244</sup> The doctrine required more than the conclusion that the product failed causing injury, but also that the product failed to provide reasonable protection under the circumstances.<sup>245</sup> As part of meeting its burden of proof, the estate had to demonstrate "that a feasible, safer, more practicable product design

---

230. TRW Vehicle Safety Systems, Inc. made the seat belt. *Id.*

231. *Id.*

232. *Id.* at 422.

233. *Id.*

234. *Id.*

235. See IND. CODE § 34-20-5-1 (2008).

236. *Ford Motor Co.*, 905 N.E.2d at 422.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 422-23.

241. *Id.* at 423.

242. *Id.*

243. *Id.*

244. *Id.* (citing *Miller v. Todd*, 551 N.E.2d 1139, 1140 (Ind. 1990)).

245. *Id.* (citing *Miller*, 551 N.E.2d at 1143).



would have afforded better protection.”<sup>246</sup> Phrased another way, Indiana law requires a plaintiff to establish “another design not only could have prevented the injury but also was cost-effective under general negligence principles.”<sup>247</sup>

The *Moore* court recognized that expert opinion testimony is typically required to establish a design defect.<sup>248</sup> Once the expert had been permitted to testify, establishing a defect in a crashworthiness case requires more than just opinion testimony.<sup>249</sup> “Opinions must be supported by reliable data, such as testing, studies, or statistics to show the feasibility of alternative design proposals.”<sup>250</sup> Although hands-on testing is not an absolute prerequisite, some level of intellectual rigor, such as reviewing experimental, statistical, or scientific data generated by those in the field, is needed.<sup>251</sup> The court concluded that

in a negligent design/crashworthiness case [a plaintiff] must go beyond criticism of a defendant’s design and proof of product failure. The plaintiff must proffer a demonstrably better design that is feasible to implement in order to show that the defendant was negligent in selecting and implementing a design deemed to be inferior.<sup>252</sup>

The *Moore* court next turned to the estate’s proposed alternative seat belt assembly theories. Plaintiff’s expert theorized that when four conditions were met, an intermittent release of seatbelt webbing could occur; however, the expert was unable to produce any testing to replicate the actual conditions of the accident at issue.<sup>253</sup> The expert also described and recommended the use of a different latch plate in the seatbelt system than what Ford and TRW had used, but no other evidence was offered to demonstrate that if the alternative was implemented an overall safety improvement would occur.<sup>254</sup> Moreover, the expert’s theories that seat belt pretensioners were feasible alternative designs was similarly without support because the expert did not have any real world data or a statistical study comparing the nature and number of injuries to the seat belt assembly used in the Explorer at issue to the alternative proposed.<sup>255</sup>

The court recognized that an IPLA claimant must prove that the defendant failed to exercise reasonable care under the circumstances in designing the product.<sup>256</sup> The court would not permit the expert “to establish the existence of a design defect by his mere assertion.”<sup>257</sup> “In plain words, an assertion is only a

---

246. *Id.* at 423-24.

247. *Id.* at 424 (quoting *Pries v. Honda Motor Co., Ltd.*, 31 F.3d 543, 546 (7th Cir. 1994)).

248. *Id.* at 426 (quoting *Pries*, 31 F.3d at 546).

249. *Id.*

250. *Id.*

251. *Id.* at 427.

252. *Id.*

253. *Id.* at 428.

254. *Id.*

255. *Id.* at 430-32.

256. *Id.* at 431 (citing IND. CODE § 34-20-2-2 (2008)).

257. *Id.* (quoting *Whitted v. Gen. Motors Corp.*, 58 F.3d 1200, 1206 (7th Cir. 1995)).

hypothesis until there is evidence to support its truth.”<sup>258</sup>

The court of appeals next addressed claims that the sunroof was defectively designed.<sup>259</sup> As noted above, the driver was ejected through the sunroof and the accident reconstruction expert opined that the sunroof had dislodged during the vehicle’s first roll.<sup>260</sup> It was believed that the driver was ejected during a later roll of the vehicle and a medical examiner testified that the driver “should have survived” if he remained in the vehicle.<sup>261</sup> The estate presented another expert who testified that it would cost only one or two dollars to strengthen the sunroof and that the brackets used to retain the sunroof were not strong enough because they failed and were bent.<sup>262</sup> The expert went on to opine that there were numerous ways to reinforce the sunroof, but he did not build an alternative and test it.<sup>263</sup> Further, the estate did not present any evidence, statistical or otherwise, that the benefits of modifying the sunroof to make it more robust and better able to retain occupants outweighed the incumbent costs and would improve safety.<sup>264</sup> The court concluded that the estate failed to present sufficient evidence that Ford and TRW had breached a duty of reasonable care and reversed the jury’s verdict.<sup>265</sup>

The Indiana Court of Appeals’ unpublished decision in *Green v. Ford Motor Co.*<sup>266</sup> is another design defect case decided during the 2009 survey period. As in *Moore*, the plaintiff was injured in a single vehicle accident involving a Ford Explorer.<sup>267</sup> The plaintiff sued Ford, claiming that the Explorer was defectively designed because it was particularly susceptible to rolling over.<sup>268</sup> Ford moved to dismiss the claims because the post-crash vehicle involved in the crash irreparably compromised its ability to defend the claim had been irreparably compromised.<sup>269</sup>

The plaintiff never had possession of the vehicle after his accident, was unemployed when the accident occurred, and said that he lacked the ability and the funds to purchase the Explorer after the crash.<sup>270</sup> Television video crews, however, videotaped the vehicle after the crash, some digital photographs were taken of the vehicle, and Green had the opportunity to inspect it before it was destroyed.<sup>271</sup>

---

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 432.

263. *Id.*

264. *Id.*

265. *Id.* at 432-33.

266. No. 1:08-cv-0163-LJM-TAB; 2008 U.S. Dist. LEXIS 96278 (S.D. Ind. Nov. 25, 2008).

267. *Id.* at \* 1-2.

268. *Id.* at \*2.

269. *Id.* at \*1, \*3-4.

270. *Id.* at \*2-3.

271. *Id.* at \*3.



According to the court, Ford's motion to dismiss should be denied if Ford could adequately defend itself without the vehicle.<sup>272</sup> The plaintiff contended that Ford did not need the Explorer because his defect theory challenged the design of the vehicle, not a specific defect that was peculiar to his vehicle.<sup>273</sup> The court agreed with the plaintiff, recognizing that the design defect was a constant that was unaffected by the accident in question and the vehicle was not necessary for Ford's defense.<sup>274</sup> The vehicle's unavailability did not destroy the design of the vehicle, and both parties had access to other evidence concerning the design of the vehicle such as schematics, expert testimony, and testing.<sup>275</sup>

The court reached the same conclusion with regard to the plaintiff's allegations that the seat belt system was defectively designed.<sup>276</sup> Ford argued that it needed the vehicle to be able to inspect the seat belt to determine whether the plaintiff was wearing it at the time of his accident.<sup>277</sup> The court rejected Ford's argument, pointing out that other avenues were available to Ford to attempt to determine whether the plaintiff was properly belted.<sup>278</sup>

3. *Manufacturing Defect Theory*.—There were no key decisions involving manufacturing defect theories from courts in Indiana during the 2009 survey period, although there have a handful of important decisions in that area in recent years.<sup>279</sup>

#### *E. Regardless of the Substantive Legal Theory*

Indiana Code section 34-20-1-1 provides that the IPLA "governs all actions that are: (1) brought by a user or consumer; (2) against a manufacturer or seller; and (3) for physical harm caused by a product; *regardless of the substantive legal theory or theories upon which the action is brought*."<sup>280</sup> At the same time, however, Indiana Code section 34-20-1-2 provides that the "[IPLA] shall not be construed to limit any other action from being brought against a seller of a product."<sup>281</sup>

---

272. *Id.* at \*5.

273. *Id.* at \*7.

274. *Id.* at \*8-9 (citations omitted).

275. *Id.*

276. *Id.* at \*10.

277. *Id.*

278. *Id.*

279. *Campbell v. Supervalu, Inc.*, 565 F. Supp. 2d 969, 980 (N.D. Ind. 2008) (holding that evidence was insufficient as a matter of law to allow jury to decide whether ground beef purchased at a local grocery store caused child's *E. coli* poisoning). For a more detailed discussion about *Campbell* in the manufacturing defect context, see Alberts et al., *supra* note 41, at 1135-39. See also *Gaskin v. Sharp Elec. Corp.*, No. 2:05-CV-303, 2007 U.S. Dist. LEXIS 72347 (N.D. Ind. Sept. 26, 2007) (addressing substantive issues raised in the context of an alleged manufacturing defect). For a detailed analysis of *Gaskin*, see Alberts et al., *supra* note 156, at 1176-80.

280. IND. CODE § 34-20-1-1 (2008) (emphasis added).

281. *Id.* § 34-20-1-2.

Many recent Indiana decisions reveal that judges and practitioners are struggling mightily in their attempts to determine legislative intent with regard to the interplay between those two provisions. The struggle usually involves how to handle claims that seek recovery based upon alleged breaches of warranty or other UCC-based theories of recovery.

There is a strong argument that the IPLA provides the exclusive remedy against a product's manufacturer or seller when that product has caused "physical" harm to a person or property because that is the only practical interpretation that gives effect to the phrase "*regardless of the substantive legal theory or theories upon which the action is brought.*"<sup>282</sup> Such language seems to be persuasive evidence of legislative intent to ensure that IPLA provides the sole and exclusive remedy against a product's manufacturer or seller when the product at issue has caused the "physical" harm alleged. Indeed, the IPLA is quite clear that, for its purposes, "physical harm" means "bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property."<sup>283</sup> It "does not include gradually evolving damage to property or economic losses from such damage."<sup>284</sup> Accordingly, if the damage caused by the use or consumption of a product is purely economic in nature and does not involve "physical" property or personal injury as the IPLA defines the term, then the claimant has, by definition, not suffered a loss for which the IPLA provides the remedy. Rather, the exclusive remedies available to claimants who have sustained economic losses or other non-physical losses would seem to be found either in the common law or in UCC/contract-based authority. Such actions appear to be among the "other action[s]" that Indiana Code section 34-20-1-2 makes clear that the General assembly did not intend to limit.<sup>285</sup>

Thus, the IPLA and UCC/contract-based authority do not seem to be "alternative" remedies, but rather separate ones—each to be merged with the other depending upon the type of loss sustained.<sup>286</sup> Economic losses merge into one UCC/contract-based cause of action and "physical" losses (as the IPLA defines

---

282. *Id.* § 34-20-1-1 (emphasis added).

283. *Id.* § 34-6-2-105(a).

284. *Id.* § 34-6-2-105(b).

285. Indeed, the legal theories and claims to which Indiana Code section 34-20-1-2 appear to except from the IPLA's reach fall into one of three categories: (1) those that do not involve physical harm (i.e., economic losses that are otherwise covered by contract or warranty law); (2) those that do not involve a "product;" and (3) those that involve entities that are not "manufacturers" or "sellers" under the IPLA.

286. That concept is consistent with Indiana law insofar as Indiana courts have not allowed claims for economic losses to be merged into tort actions. Indeed, the economic loss doctrine precludes a claimant from maintaining a tort-based action against a defendant when the only loss sustained is an economic as opposed to a "physical" one. *E.g.*, *Gunkel v. Renovations, Inc.*, 822 N.E.2d 150, 151 (Ind. 2005); *Fleetwood Enters., Inc. v. Progressive N. Ins. Inc.*, 749 N.E.2d 492, 495-96 (Ind. 2001); *Progressive Ins. Co. v. Gen. Motors Corp.*, 749 N.E.2d 484, 488-89 (Ind. 2001).



them) merge into one IPLA-based cause of action. A number of recent decisions, such as *Cincinnati Insurance Cos. v. Hamilton Beach/Proctor-Silex, Inc.*,<sup>287</sup> *Ryan ex rel. Estate of Ryan v. Philip Morris USA, Inc.*,<sup>288</sup> *Fellner v. Philadelphia Toboggan Coasters, Inc.*,<sup>289</sup> and *New Hampshire Insurance Co. v. Farmer Boy AG, Inc.*,<sup>290</sup> have recognized the distinction, often holding that breach of warranty claims “merge” with the IPLA when the harm is “physical” in nature as opposed to purely economic.

One case decided during the 2009 survey period, however, did not merge breach of warranty claims with IPLA-based claims, even though the case involved “physical harm” as defined by the IPLA. In *American International Insurance Co. v. Gastite*,<sup>291</sup> the court did not merge separate breach of express and implied warranty claims with IPLA-based claims,<sup>292</sup> apparently believing that

---

287. No. 4:05 CV 49, 2006 WL 299064 (N.D. Ind. Feb. 7, 2006). There, a fire that allegedly started in a toaster manufactured by the defendant, Hamilton Beach/Proctor Silex (“Hamilton Beach”), destroyed a couple’s home and personal property. *Id.* at \*1. Cincinnati Insurance insured the couple’s home and brought a subrogation action against Hamilton Beach, asserting claims for negligence, breach of warranty, strict liability, violation of the Magnuson-Moss Warranty Act, and negligent failure to recall. *Id.* Hamilton Beach moved to dismiss the negligence, warranty, Magnuson-Moss, and negligent failure to recall claims. *Id.* The court agreed that the IPLA subsumes and incorporates all negligence and tort-based warranty claims. *Id.* at \*2.

288. No. 1:05 CV 162, 2006 WL 449207 (N.D. Ind. Feb. 22, 2006). In *Ryan*, the widow of a man who allegedly died because of smoking asserted causes of action against several cigarette manufacturers for product liability, negligence, and fraud. *Id.* at \*1. The defendants argued that the IPLA provides the sole and exclusive remedy for personal injuries allegedly caused by a product. *Id.* at \*2. The court agreed, holding that the IPLA unequivocally precludes a plaintiff’s common law negligence and fraud claims. *Id.* at \*2-3.

289. No. 3:05-cv-218-SEB-WGH, 2006 WL 2224068 (S.D. Ind. Aug. 2, 2006). The *Fellner* case involved a person who was killed when she was ejected from a wooden roller coaster at Holiday World amusement park. *Id.* at \*1. Like the decisions in *Cincinnati Insurance* and *Ryan*, the *Fellner* decision held that the tort-based implied warranty claim merged into plaintiff’s IPLA-based product liability claims, resulting in dismissal of the breach of implied warranty claim because it was not a stand-alone theory of recovery. *Id.* at \*4.

290. No. IP 98-0031-C-T/G, 2000 U.S. Dist. LEXIS 19502, at \*9-11 (S.D. Ind. Dec. 19, 2000) (holding that a claim alleging breach of implied warranty in tort had been superseded by IPLA-based liability, and thus, plaintiff could proceed on a warranty claim so long as it was limited to a breach of contract theory).

291. No. 1:08-cv-1360-RLY-DML, 2009 U.S. Dist. LEXIS 41529 (S.D. Ind. May 14, 2009).

292. There was some question about whether the plaintiff in *Gastite* had sufficiently stated cognizable claims both as to its express and implied warranty theories. The court found that the plaintiff had, indeed, pleaded sufficient facts to support the express warranty claim, but concluded that it had not properly supported a claim for breach of implied warranty of merchantability. *Id.* at \*10-11. The plaintiff apparently intended to state a claim for breach of the implied warranty of merchantability, but contended that the product was not fit for its intended use and purpose, which actually is the evidentiary predicate for a breach of the implied warranty of fitness for a particular purpose claim. *Id.* at \*11. Accordingly, the court went light on the plaintiff, refusing to dismiss

the plaintiff could pursue them alternatively and separately against a defendant even though the physical harm (property damage caused by a house fire) is without question the type of harm that the IPLA is intended to cover.<sup>293</sup> In a footnote, the *Gastite* court wrote that, “[a]lthough the IPLA provides a single cause of action for a user seeking to recover in tort from a manufacturer for harm caused by a defective product . . . a plaintiff may maintain a separate cause of action under a breach of warranty theory.”<sup>294</sup> The authority cited for that statement is *Hitachi Construction Machine Co. v. AMAX Coal Co.*<sup>295</sup> Reliance on *Hitachi* to support that point is tenuous at best, though, because the authority cited in *Hitachi* on that point is from 1991, four years before the Indiana General Assembly changed the law when it enacted the 1995 amendments to the IPLA to add the “regardless of the substantive legal theory” language.<sup>296</sup>

Two other decisions issued during the 2009 survey period help to establish that courts and practitioners probably will continue to struggle with the “merger” issue. In both cases, the courts simply refused to take on the issue. In *Collins v. Pfizer, Inc.*,<sup>297</sup> the estate of a man who committed suicide sued the manufacturer of a smoking cessation drug on the theory that the drug caused the suicide.<sup>298</sup> The original complaint included claims for negligence, strict liability, breach of express warranty, and breach of implied warranty, in addition to several other theories of recovery.<sup>299</sup> The drug manufacturer argued that the IPLA “subsumed or preempted” the warranty claims.<sup>300</sup> The *Collins* court recognized that “the relationship between tort claims under the IPLA and contract-based claims for breach of warranty under the UCC is still evolving in Indiana law.”<sup>301</sup> The court continued:

[B]reach of warranty claims are treated as not subsumed by the IPLA because they are contractual in nature. Yet damages can include consequential damages, including ‘injury to person or property proximately resulting from any breach of warranty.’ Ind. Code § 26-1-2-715(2)(b). That provision seems to open the door to a claim that looks very much like a product liability claim in tort. Adding to the mystery is the fact that it is not yet clear, at least to this court, what a claim for breach of warranty adds to a plaintiff’s defective product claim under the

---

the breach of implied warranty claim with prejudice and instead granting the plaintiff leave to amend its complaint to try to properly plead its theory the second time around. *Id.*

293. *Id.* at \*9-11.

294. *Id.* at \*7 n.1.

295. 737 N.E.2d 460, 465 (Ind. Ct. App. 2000).

296. See *supra* note 6 and accompanying text. The case upon which the *Hitachi* panel relied is *B&B Paint Corp. v. Shrock Manufacturing, Inc.*, 568 N.E.2d 1017, 1020 (Ind. Ct. App. 1991).

297. No. 1:08-cv-0888-DFH-JMS; 2009 U.S. Dist. LEXIS 3719 (S.D. Ind. Jan. 20, 2009).

298. *Id.* at \*1.

299. *Id.*

300. *Id.* at \*2.

301. *Id.* at \*5.



IPLA. Contractual remedies do not extend to punitive damages.<sup>302</sup>

Alas, though, the *Collins* court refused to decide the issue because it was struggling to figure out “what difference the answer would make.”<sup>303</sup> Indeed, the court posited, “would it be possible, logically or practically, for plaintiff to lose on her IPLA claims but to win on a breach of warranty claim?”<sup>304</sup> Similarly, “[w]ould winning on a breach of warranty claim in addition to the IPLA claims authorize any additional damages?”<sup>305</sup> Accordingly, the court concluded that it saw “no need for or benefit to anyone from a federal court’s prediction of Indiana law on this question.”<sup>306</sup>

The Indiana Supreme Court had a similar opportunity in *Kovach v. Caligor Midwest*<sup>307</sup> to weigh in and perhaps settle the issue, but it too did not accept the invitation. In *Kovach*, the plaintiffs alleged that a nurse gave their son a fatal overdose of pain medication after a surgical procedure.<sup>308</sup> The plaintiffs sued the manufacturers and distributors of the medicine cup used to administer the medication, alleging design and warning theories.<sup>309</sup> As noted in Part I.D. above, the court ultimately affirmed the trial court’s grant of summary judgment based upon a lack of evidence of proximate causation.<sup>310</sup> The *Kovach* plaintiffs asserted claims against the manufacturer and distributors of the cup both under the IPLA and under UCC-based implied warranty theories.<sup>311</sup> A majority panel of the Indiana Court of Appeals concluded that the UCC and the IPLA provide “alternative remedies,” and it allowed both IPLA and UCC claims to remain in the case.<sup>312</sup>

The Indiana Supreme Court acknowledged that it has “never addressed whether the [I]PLA preempts warranty-based theories of recovery for physical harm, but several federal district courts and other panels of the Court of Appeals have held that tort-based breach-of-warranty claims have been subsumed into the [I]PLA.”<sup>313</sup> Even if two separate alternative theories are permissible under the

---

302. *Id.* at \*5-6 (citing *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*, 608 N.E.2d 975, 984 (Ind. 1993)).

303. *Id.* at \*12.

304. *Id.*

305. *Id.*

306. *Id.*

307. 913 N.E.2d 193 (Ind. 2009), *reh’g denied*, No. 49S04-0902-CV-88, 2009 Ind. LEXIS 1514 (Ind. Dec. 3, 2009).

308. *Id.* at 195.

309. *Id.* at 195-96.

310. *Id.* at 195, 199. The court did so because the undisputed facts established “that if an overdose caused the death it[,], as due to a quantity of drug essentially double the prescribed amount” and that “[n]one of the claimed defects . . . would have caused an overdose of that magnitude.” *Id.* at 195.

311. *Id.* at 197.

312. *Id.*

313. *Id.* (citing, among others, *Cincinnati Ins. Hamilton Beach/Proctor-Silex, Inc.*, No. 4:05

facts, the *Kovach* court recognized that all such theories “require proof that the injury sustained was proximately caused by the alleged product defect.”<sup>314</sup> And, because the court concluded they were not, it did not believe it needed to answer whether the UCC and IPLA theories are merged or alternative theories: “We therefore do not resolve the relationship between the [I]PLA and the UCC today, as that issue is directly raised only by amici, and presented obliquely, if at all, by the parties.”<sup>315</sup>

Other decisions interpreting the IPLA in recent years (including two during the 2009 survey period) have allowed non-IPLA-based claims—usually under the guise of “common law” authority—to be maintained when the IPLA is inapplicable either because the plaintiffs were not users or consumers, or the defendants were not manufacturers or sellers of a product, or no physical harm was involved, or the allegations were limited to negligent repair or maintenance of a product as opposed to a product defect.<sup>316</sup> One of the 2009 cases, *Duncan v. M&M Auto Service, Inc.*,<sup>317</sup> involved the latter scenario.<sup>318</sup>

---

CV 49, 2006 WL 299064 (N.D. Ind. Feb. 7, 2006), and *N.H. Ins. Co. v. Farmer Boy AG*, No. IP98-0031-GT/G, 2000 WL 33125128 (S.D. Ind. Dec., 19, 2000)).

314. *Id.*

315. *Id.*

316. *E.g.*, *Ritchie v. Gildden Co.*, 242 F.3d 713 (7th Cir. 2001); *Goines v. Fed. Express Corp.*, No. 99-CV-4307-JPG, 2002 U.S. Dist. LEXIS 5070 (S.D. Ill. Jan. 8, 2002) (applying Indiana law); *Vaughn v. Daniels Co.*, 841 N.E.2d 1133 (Ind. 2006); *Kennedy v. Guess, Inc.*, 806 N.E.2d 776 (Ind. 2004); *Deaton v. Robinson*, 878 N.E.2d 499 (Ind. Ct. App. 2007); *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522 (Ind. Ct. App. 2004). A couple of other cases merit attention. In *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422 (Ind. Ct. App. 2007), *reh'g denied* (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 978 (Ind. 2009), the alleged harm underlying the City of Gary's public nuisance claim was not the actual deaths or injuries suffered as a result of gun violence, but rather the increased availability or supply of handguns “to criminals, juveniles, and others who may not lawfully purchase them.” *Id.* at 426 (citing *City of Gary*, 801 N.E.2d at 1231). Accordingly, there was no “physical harm” involved in that case, as the IPLA defines the term. *Dutchmen Manufacturing, Inc. v. Reynolds*, 891 N.E.2d 1074 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1233 (Ind. 2008), is another example of a case in which the court allowed non-IPLA-based liability to be imposed, but that case did not involve a “product” nor was a “manufacturer” or “seller” involved.

317. 898 N.E.2d 338 (Ind. Ct. App. 2008).

318. Plaintiff was injured in an explosion while filling a van's natural gas tank. *Id.* at 340. His expert witness claimed that the defendant auto repair shop negligently installed a fuel conversion kit that was necessary to allow the van to run on natural gas. *Id.* at 340-41. The natural gas system contained a check valve designed to ensure that natural gas flows only in one direction. *Id.* His expert believed that a second, redundant check valve should have been installed so as to prevent gas from escaping in the event that the first check valve failed and that a redundant check valve would have been important to have. *Id.* Plaintiff's operative theory of recovery in the case was that the auto repair shop “negligently installed and maintained” the natural gas system. *Id.* at 341. The court refused to allow any liability to be imposed against the repair shop under the IPLA as a manufacturer. *Id.* at 342. Although the *Duncan* court affirmed the trial court's grant of



In *Pawlik v. Industrial Engineering and Equipment Co.*,<sup>319</sup> the second of the two 2009 cases in this area, the plaintiff, an employee of a company specializing in installing heating equipment, was injured while trying to load onto a truck a large shipping crate containing three electrical heaters manufactured by defendant Industrial Engineering and Equipment Company ("Industrial").<sup>320</sup> Industrial sold duct heaters through a distributor that, in turn, shipped them to plaintiff's employer for installation at a Portage, Indiana facility.<sup>321</sup> Industrial manufactured the heater in the 310-pound crate at issue.<sup>322</sup> For protection during shipping, the heaters were wrapped with plastic, placed on a standard wood pallet, then encased in a crate constructed of 1" x 6" wood slat boards fastened to the pallet by staples and nails.<sup>323</sup> While unloading the crates, plaintiff decided to "just manhandle" the heavy crate in an effort to save time.<sup>324</sup> During the course of "manually tugging on the wooden crate," plaintiff claimed that at least one slat detached, causing him to fall backwards into the bed of the truck and causing him a severe cut as well as changes in personality and mood.<sup>325</sup>

Plaintiff's claims against Industrial included both IPLA-based product liability theories and express and implied warranty theories.<sup>326</sup> The court dismissed the IPLA-based claims against Industrial, concluding that it was not the manufacturer or seller of the crate and that plaintiff was not a user or consumer.<sup>327</sup> Having done so, the court went on to note that claims against Industrial for negligence and breach of express and implied warranties nevertheless "survive." The *Pawlik* court cited the Indiana Supreme Court's decision in *Vaughn v. Daniels Co.*<sup>328</sup> in rejecting any notion or implication by Industrial that "because the IPLA factors are not fulfilled, all liability is barred."<sup>329</sup>

## II. STATUTES OF LIMITATION AND REPOSE

The IPLA contains a statute of limitation and a statute of repose for product

---

summary judgment to the repair shop, it did not end its discussion by disposing of the IPLA claim but rather undertook an analysis of plaintiffs' claims in the context of a "common law" negligence claim based upon Section 400 of the Restatement (Second) of Torts. *Id.* at 342-43.

319. No. 2:07 cv 220, 2009 U.S. Dist. LEXIS 27800 (N.D. Ind. Mar. 27, 2009).

320. *Id.* at \*2-3. At the time of his injury, plaintiff was an employee of a contractor specializing in manufacturing and installing commercial and industrial heating, ventilation, air conditioning, and plumbing systems.

321. *Id.* at \*2.

322. *Id.*

323. *Id.* at \*2-3.

324. *Id.*

325. *Id.* at \*4.

326. *Id.* at \*5.

327. *Id.* at \*13-16.

328. 841 N.E.2d 1133, 1146 (Ind. 2006).

329. 2009 U.S. Dist. LEXIS at \*17.

liability claims. Indiana Code section 34-20-3-1 provides:

(a) This section applies to all persons regardless of minority or legal disability. Notwithstanding [Indiana Code section] 34-11-6-1, this section applies in any product liability action in which the theory of liability is negligence or strict liability in tort.

(b) Except as provided in section 2 of this chapter, a product liability action must be commenced:

(1) within two (2) years after the cause of action accrues; or

(2) within ten (10) years after the delivery of the product to the initial user or consumer.

However, if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.<sup>330</sup>

The Indiana Supreme Court issued an important decision during the 2009 survey period interpreting the IPLA's statute of limitations in light of the statute of limitations applicable to actions brought under Indiana's Wrongful Death Act (IWDA). In *Technisand, Inc. v. Melton*,<sup>331</sup> the Indiana Supreme Court analyzed the interplay between the statutes of limitation in the IWDA and the IPLA.<sup>332</sup> In that case, the decedent died of leukemia on July 25, 2002.<sup>333</sup> The decedent's employer provided the decedent's counsel with a letter and Material Safety Data Sheet stating that the decedent could have been exposed to carcinogenic formaldehyde fumes as a result of her work with resin-coated sand<sup>334</sup> manufactured by Technisand.<sup>335</sup>

In October 2003, the decedent's estate ("the Estate") filed a lawsuit against the decedent's employer and several other companies.<sup>336</sup> On November 29, 2004, the decedent's doctor informed the Estate that the decedent's exposure to formaldehyde "may have placed [her] at a greater risk for leukemia."<sup>337</sup> Based

---

330. IND. CODE § 34-20-3-1 (2008). Recent decisions have used the IPLA's statute of repose to dispose cases as untimely. *E.g.*, *C.A. v. Amli at Riverbend, L.P.*, No. 1:06-cv-1736-SEB-JMS, 2008 U.S. Dist. LEXIS 2558, at \*8 (S.D. Ind. Jan. 10, 2008); *Campbell v. Supervalu, Inc.*, 565 F. Supp. 2d 969, 977 (N.D. Ind. 2008). For more detailed discussions about these cases, see Alberts et al., *supra* note 41, at 1147-51. In addition, product liability cases involving asbestos products have a unique statute of limitations. See IND. CODE § 34-20-3-2(a). For a discussion of the asbestos-related statute of repose, see *Ott v. AlliedSignal, Inc.*, 827 N.E.2d 1144 (Ind. Ct. App. 2005). There were no key cases decided during the 2009 survey period involving the asbestos statute of repose.

331. 898 N.E.2d 303 (Ind. 2008).

332. *Id.* at 303.

333. *Id.* at 304.

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*



on this information, the estate amended its complaint and added Technisand as a defendant on February 16, 2005.<sup>338</sup>

Technisand filed a motion for summary judgment claiming that the complaint was not timely filed.<sup>339</sup> Technisand argued that IWDA provided the applicable statute of limitations, which required the claim to have been brought within two years of the decedent's death.<sup>340</sup> The Estate argued that the relevant statute of limitation was found in the IPLA, which required the action to be brought within two years after the cause of action accrued.<sup>341</sup> The trial court denied the motion for summary judgment.<sup>342</sup> The Indiana Court of Appeals affirmed the trial court's decision.<sup>343</sup> The Indiana Supreme Court, however, reversed.<sup>344</sup>

The Indiana Supreme Court began its discussion by stating that the IPLA allows an action to be brought within two years after the cause of action accrues.<sup>345</sup> The court noted that under *Degussa Corp. v. Mullens*,<sup>346</sup> the cause of action under the IPLA accrues when a doctor informs the plaintiff that there is a reasonable possibility that the product caused the injury.<sup>347</sup> The Estate argued that the action was timely filed because the Estate received the doctor's letter on November 29, 2004, and amended its complaint on February 16, 2005.<sup>348</sup>

The Indiana Supreme Court found that this analysis was incorrect because it failed to take into account Indiana's Survival Statute,<sup>349</sup> which provides that where an individual dies because of personal injuries, the claim or cause of action does not survive the decedent's death.<sup>350</sup> Rather, the cause of action becomes one for wrongful death.<sup>351</sup> The court relied on the *Ellenwine v. Fairley*<sup>352</sup> and *Randolph v. Methodist Hospitals, Inc.*<sup>353</sup> cases in concluding that where the limitations period for the IWDA expires before the limitation period for the IPLA, the claim must be filed within the statute of limitations for the IWDA.<sup>354</sup>

Under the Survival Act, the decedent's products liability claim against Technisand ended at her death and only the Wrongful Death Act claim

---

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.* at 306.

345. *Id.* at 304; IND. CODE § 34-20-3-1(b)(1) (2008).

346. 744 N.E.2d 407, 411 (Ind. 2001).

347. *Technisand*, 898 N.E.2d at 304.

348. *Id.*

349. IND. CODE § 34-9-3-1 (2008).

350. *Technisand*, 898 N.E.2d at 305.

351. *Id.*

352. 846 N.E.2d 657, 665-66 (Ind. 2006).

353. 793 N.E.2d 231, 237 (Ind. Ct. App. 2003).

354. *Technisand*, 898 N.E.2d at 305-06.

survived.<sup>355</sup> Wrongful Death claims require wrongful death actions to be commenced within two years of the decedent's death. The Estate conceded that it did not sue Technisand within two years of death.<sup>356</sup> Thus, the Estate could not use the IPLA statute of limitations as an alternative to the wrongful death statute of limitations.<sup>357</sup>

### III. EVIDENTIARY PRESUMPTIONS AND DEFENSES

Although there were no key decisions issued during the 2009 survey period that dealt with the IPLA's evidentiary presumptions or its defenses, judges and practitioners should nevertheless be mindful of their existence and of recent case law interpreting and applying them.

#### A. *Compliance with State-of-the-Art and Government Standards*

The IPLA, via Indiana Code section 34-20-5-1, entitles a manufacturer or seller to "a rebuttable presumption that the product that caused the physical harm was not defective and that the manufacturer or seller of the product was not negligent if, before the sale by the manufacturer, the product" conformed with the "generally recognized state of the art" or with applicable government codes, standards, regulations, or specifications.<sup>358</sup> Recent decisions in *Bourke v. Ford Motor Co.*,<sup>359</sup> *Flis v. Kia Motors Corp.*,<sup>360</sup> and *Schultz v. Ford Motor Co.*<sup>361</sup> all meaningfully address the foregoing presumptions.<sup>362</sup>

#### B. *Use with Knowledge of Danger (Incurred Risk) Defense*

Indiana Code section 34-20-6-3 provides that "[i]t is a defense to an action under [the IPLA] that the user or consumer bringing the action: (1) knew of the defect; (2) was aware of the danger in the product; and (3) nevertheless proceeded to make use of the product and was injured."<sup>363</sup> Incurred risk is a defense that "involves a mental state of venturousness on the part of the actor and demands a subjective analysis into the actor's actual knowledge and voluntary acceptance of the risk."<sup>364</sup> It is a "complete" defense in that it precludes a defendant's IPLA liability (in design and warning defect cases) if it is found to

---

355. *Id.*

356. *Id.*

357. *Id.*

358. IND. CODE § 34-20-5-1 (2008).

359. No. 2:03-CV-136, 2007 U.S. Dist. LEXIS 15871 (N.D. Ind. Mar. 5, 2007).

360. No. 1:03 CV 1567-JDT-TAB, 2005 WL1528227 (S.D. Ind. June 20, 2005).

361. 857 N.E.2d 977 (Ind. 2006).

362. For a detailed discussion about all three cases, see Alberts et al., *supra* note 156, at 1195-1200.

363. IND. CODE § 34-20-6-3 (2008).

364. *Cole v. Lantis Corp.*, 714 N.E.2d 194, 200 (Ind. Ct. App. 1999) (citing *Schooley v. Ingersoll Rand, Inc.*, 631 N.E.2d 932, 940 (Ind. Ct. App. 1994)).



apply to a particular set of factual circumstances.<sup>365</sup>

### *C. Misuse Defense*

Indiana Code section 34-20-6-4 provides that “[i]t is a defense to an action under [the IPLA] that a cause of the physical harm is a misuse of the product by the claimant or any other person not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product to another party.”<sup>366</sup> Knowledge of a product’s defect is not an essential element of establishing the misuse defense. The facts necessary to prove the defense of “misuse” many times may be similar to the facts necessary to prove either that the product is in a condition “not contemplated by reasonable” users or consumers under Indiana Code section 34-20-4-1(1)<sup>367</sup> or that the injury resulted from “handling, preparation for use, or consumption that is not reasonably expectable” under Indiana Code section 34-20-4-3.<sup>368</sup>

### *D. Modification/Alteration Defense*

Indiana Code section 34-20-6-5 provides:

It is a defense to an action under [the IPLA] that a cause of the physical harm is a modification or alteration of the product made by any person after the product’s delivery to the initial user or consumer if the modification or alteration is the proximate cause of physical harm where the modification or alteration is not reasonably expectable to the seller.<sup>369</sup>

---

365. *Vaughn v. Daniels Co.*, 841 N.E.2d 1133, 1146 (Ind. 2006) (“Incurred risk acts as a complete bar to liability with respect to negligence claims brought under the [I]PLA.” (citing IND. CODE § 34-20-6-3)). On that point, the *Vaughn* decision is consistent with several earlier cases, *see, e.g.*, *Baker v. Hey-Am.*, 799 N.E.2d 1135, 1145 (Ind. Ct. App. 2003); *Hopper v. Carey*, 716 N.E.2d 566, 575, 576 (Ind. Ct. App. 1999); *Cole*, 714 N.E.2d at 200, all of which stated that incurred risk is a complete defense in Indiana. *Cf. Mesman v. Crane Pro Servs.*, 409 F.3d 846 (7th Cir. 2005); *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522 (Ind. Ct. App. 2004). Although it held that no IPLA-based claims survived summary judgment, the *Vaughn* court did allow a common law negligence claim to proceed against Daniels and, accordingly, allowed the issue of Vaughn’s fault to remain in the case for the jury’s consideration solely in connection with the negligence claim. *Vaughn*, 841 N.E.2d at 1145-46. For a discussion about the nature of the negligence claim that the court allowed to survive summary judgment, *see* Alberts & Petersen, *supra* note 157, at 1037-39.

366. IND. CODE § 34-20-6-4 (2008). Stated in a slightly different way, misuse is a “use for a purpose or in a manner not foreseeable by the manufacturer.” *Henderson v. Freightliner, LLC*, No. 1:02-cv-1301-DFH-WTL, 2005 U.S. Dist. LEXIS 5832, at \*10 (S.D. Ind. Mar. 24, 2005) (quoting *Barnard v. Saturn Corp.*, 790 N.E.2d 1023, 1030 (Ind. Ct. App. 2003)).

367. IND. CODE § 34-20-4-1(1) (2008).

368. *Id.* § 34-20-4-3.

369. *Id.* § 34-20-6-5. Before the 1995 Amendments to the IPLA, product modification or alteration operated as a complete defense. *See, e.g.*, *Foley v. Case Corp.*, 884 F. Supp. 313, 315

The modification/alteration defense is incorporated into the basic premise for product liability in Indiana as set forth in Indiana Code section 34-20-2-1, which provides:

[A] person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user's or consumer's property is subject to liability for physical harm caused by that product to the user or consumer or to the user's or consumer's property if . . . the product is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article.<sup>370</sup>

The interplay between these two statutes as it relates to a product's condition is important for courts and practitioners to understand. As briefly discussed above, evidence of a product's condition after leaving the manufacturer's or seller's control is significant *both* as an IPLA-mandated threshold requirement for which the plaintiff bears the burden of proof, as well as an IPLA-based affirmative defense for which the defendant bears the burden of proof.<sup>371</sup>

#### IV. FEDERAL PREEMPTION

Federal laws preempt state laws in three circumstances: "(1) when the federal statute explicitly provides for preemption; (2) when Congress intended to occupy the field completely; and (3) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>372</sup> Federal preemption has been a hot topic both in federal and

---

(S.D. Ind. 1994).

370. IND. CODE § 34-20-2-1 (2008).

371. *See, e.g.,* Gaskin v. Sharp Elecs. Corp., No. 3:05-CV-303, 2007 U.S. Dist. LEXIS 72347, at \*22-26 (N.D. Ind. Sept. 26, 2007). In a product liability case in Indiana, the IPLA requires the plaintiff, in order to establish his or her prima facie case, to demonstrate, first, that the product was in a defective condition at the time the seller or manufacturer conveyed it to another party (IND. CODE § 34-20-4-1 (2008)) and, second, that the product reached him or her "without substantial alteration." *Id.* § 34-20-2-1. If a plaintiff's evidence is insufficient to meet those requirements as a matter of law either before or at trial, then he or she has failed to establish a prima facie product liability case. The defendant, on the other hand, can and should introduce evidence to establish either that the product was substantially altered before it reached the plaintiff or that it was substantially modified or altered after delivery to the initial user or consumer and such modification or alteration proximately caused the damages alleged. Establishing the former negates a prima facie component of plaintiff's case. Establishing the latter provides the basis for the statutory modification/alteration defense. In many cases, the same evidence will prove both points, such as a situation in which the initial user or consumer substantially altered the product before selling it to the plaintiff.

372. Thornburg v. Stryker Corp., No. 1:05-cv-1378-RLY-TAB, 2007 U.S. Dist. LEXIS 43455, at \*5 (S.D. Ind. June 12, 2007) (quoting JCW Invs., Inc. v. Novelty, Inc., 482 F.3d 910, 918 (7th



Indiana courts in recent years.<sup>373</sup> Indeed, the 2009 survey period produced yet another Indiana preemption decision. In *Cook v. Ford Motor Company*,<sup>374</sup> the court of appeals held that federal law does not preempt warning defect claims arising out of a motor vehicle accident in which a girl riding in the passenger seat of a pickup truck suffered head injuries.<sup>375</sup> The girl's parents claimed that Ford, the manufacturer of the pickup truck, failed to provide them with adequate warnings of the dangers the air bags posed to unrestrained children riding in the front seat.<sup>376</sup>

Ford argued, among other things, that regulations promulgated under the National Traffic and Motor Vehicle Safety Act ("Safety Act")<sup>377</sup> preempted the plaintiffs' claims.<sup>378</sup> Specifically, Ford claimed that Federal Motor Vehicle Standard 208<sup>379</sup> (FMVSS 208) proscribed the air bag warnings automobile manufacturers compelling their use and therefore preempted the Cooks' claims.<sup>380</sup> The version of FMVSS 208 applicable to the truck at issue required automobile manufacturers to include a specific warning affixed to the sun visors. There was no dispute that the truck at issue displayed that warning.<sup>381</sup>

Cir. 2007)).

373. *E.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 332-33 (2008) (holding that the express preemption provision of the 1976 Medical Device Amendments Act of 1976 to the federal Food, Drug, and Cosmetic Act, prohibits common law claims challenging the safety of a medical device with respect to which the U.S. Food and Drug Administration has granted premarket approval); *Tucker v. SmithKline Beecham Corp.*, 596 F. Supp. 2d 1225, 1238 (S.D. Ind. 2008) (holding Indiana state law-based inadequate warning claims were not preempted); *Roland v. General Motors Corp.*, 881 N.E.2d 722, 727 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1218 (Ind. 2008) (finding Federal Motor Vehicle Standards 208 preempted Indiana state law-based defective design claims).

374. 913 N.E.2d 311 (Ind. Ct. App. 2009), *trans. denied*, No. 49A02-0802-CV-130, 2010 Ind. LEXIS 184 (Ind. Feb. 25, 2010).

375. *Id.* at 325-26. For a more detailed discussion of the facts of the decision and the full text of the pertinent warnings and instructions, see *supra* Part I.D.1.

376. *Id.* at 316-17.

377. 49 U.S.C. § 30101 (2006).

378. *Cook*, 913 N.E.2d at 318, 320-26.

379. 49 C.F.R. § 571.208 (2009).

380. *Cook*, 913 N.E.2d at 321.

381. *Id.*

#### WARNING TO AVOID SERIOUS INJURY:

For maximum safety protection in all types of crashes, you must always wear your safety belt.

Do not install rearward-facing child seats in any front passenger seat position, unless the air bag is off.

Do not sit or lean unnecessarily close to the air bag.

Do not place any objects over the air bag or between the air bag and yourself.

See the owner's manual for further information and explanations.

*Id.*

FMVSS also contained requirements for warnings to be placed in owner's manuals:

The vehicle owner's manual shall provide in a readily understandable format:

- (a) Complete instructions on the operation of the cutoff device;
- (b) A statement that the [airbag] cutoff device should only be used when a rear-facing infant restraint is installed in the front passenger seating position; and
- (c) A warning about the safety consequences of using the cutoff device at other times.<sup>382</sup>

The plaintiffs did not dispute that the visor in the truck complied with FMVSS 208 and contained the required language.<sup>383</sup> The plaintiffs, however, took issue with the owner's manual language "that the passenger side air bag should be turned on 'unless there is a rear-facing infant seat installed in the front seat'" and with the lack of sufficient language warning of the consequences of placing children in the front seat of the vehicle with air bags.<sup>384</sup>

On the other hand, the plaintiffs' claim did not, according to the Indiana Court of Appeals, conflict with federal regulations because FMVSS 208 required that an air bag warning be included but only generally described the content of such a warning.<sup>385</sup> Thus, the court of appeals concluded that the plaintiffs' claim that the airbag warning in the owner's manual should have been worded slightly differently did not conflict with FMVSS 208 because the National Highway Traffic Safety Administration refused to establish precise language to be included in the owner's manual.<sup>386</sup> The *Cook* court believed that FMVSS 208 was intended to set a floor and not a ceiling.<sup>387</sup>

The *Cook* court distinguished the facts presented in *Geier v. American Honda Motor Co.*,<sup>388</sup> a leading case involving FMVSS 208 from the U.S. Supreme Court.<sup>389</sup> At the same time, the *Cook* court was persuaded that the

---

382. *Id.* at 322 (quoting 49 C.F.R. § 571.208).

383. *Id.* at 321-22.

384. *Id.*

385. *Id.* at 325.

386. *Id.* FMVSS 208 required manufacturers to include a warning in the owner's manual cautioning that the airbag should only be deactivated if a rear-facing child seat was placed in the front seat and otherwise to warn of the consequences if the air bag was deactivated in other circumstances. 49 C.F.R. § 571.208 (2009). The *Cook* court apparently perceived plaintiffs' theory to be that Ford insufficiently warned of the consequences of the danger the air bag posed to children sitting in the front seat. 913 N.E.2d at 322.

387. *Cook*, 913 N.E.2d at 325.

388. 529 U.S. 861 (2004).

389. *Cook*, 913 N.E.2d at 320-23. The *Cook* court wrote that in *Geier*, there was a detailed framework for 1987 model year vehicles to be equipped with different types of passive restraint systems; the regulation gave the manufacturers options from which to choose and a timeframe to comply with the regulation. *Id.* at 324-25. If *Geier*'s defect claims were allowed to go forward, his



preemption issue it faced was similar to that addressed by the U.S. Supreme Court in *Wyeth v. Levine*,<sup>390</sup> even though the two regulatory schemes governing the products were different.<sup>391</sup> As in *Wyeth*, the plaintiffs in *Cook* were seeking to have Ford improve its warnings.<sup>392</sup> The *Cook* court concluded that the duty the plaintiffs sought to impose does not conflict with FMVSS 208 and does not stand as an obstacle to accomplishing federal objectives regarding air bag warnings.<sup>393</sup>

The central theme of the court of appeals decision is that FMVSS 208 afforded manufacturers some flexibility in drafting the warnings and instructions addressing the use of airbags, and thus federal preemption was inappropriate. But as the court of appeals recognized, the *Wyeth* court addressed conflict preemption in the unique context of the Federal Food and Drugs Act and the FDA's passive label approval process,<sup>394</sup> not administrative regulations, such as the federal motor vehicle safety standards promulgated pursuant to an agency's rulemaking authority. Practitioners should not overlook or trivialize this difference. Only with the passage of time will Indiana practitioners and scholars divine whether the court of appeals' decision is an ill-advised extension of *Wyeth*.

#### CONCLUSION

Although the 2009 survey period produced slightly fewer key decisions in product liability cases than recent years, the level of legal scholarship was impressive. Perhaps above all else, however, the 2009 survey period left unanswered some important questions and some challenging issues that Indiana judges and practitioners alike will continue to confront.

---

claims would supersede the options expressly allowed by the standard and would accelerate the timeframe for implementation of the various alternative passive restraint systems permitted by the regulation. *Id.* This impermissibly conflicted with the standard and, therefore, the defect claim was preempted. *Id.*

390. 129 S. Ct. 1187 (2009).

391. *Cook*, 913 N.E.2d at 325.

392. *Id.*

393. *Id.*

394. *Wyeth*, 129 S. Ct. at 1197-98, 1203.





# 2009 SURVEY OF THE LAW OF PROFESSIONAL RESPONSIBILITY

CHARLES M. KIDD\*

## INTRODUCTION

There were a number of disciplinary actions of interest to the Indiana bar at large during this survey period. Issues addressed by the Indiana Supreme Court included lawyer advertising and solicitation and important considerations for lawyers who choose to practice in the form of limited liability entities or who may be considering forming a law practice as a limited liability entity. Another case involved an issue the supreme court is rarely called upon to address, referred to as “imputed firm status.” Imputed firm status is the practice arrangement where lawyers practice independently but may or may not be giving a clear impression of that arrangement to members of the public. As always, neglect of client matters was another topic addressed through disciplinary action. One case in particular stands out as an example of how insidious neglect can become. First, however, is a topic of relatively recent origin in the ethics rules. It is lawyers’ use of some physical or social trait to advocate against another party. Although there are situations where legitimate advocacy may include the use of factors like race or ethnicity, there are occasions when that advocacy may cross the line and become not only improper, but may subject the lawyer to disciplinary action.

### I. IMPROPER USE OF RACE, GENDER, OR NATIONAL ORIGIN

The Indiana Supreme Court imposed a public reprimand on an attorney for violating Indiana Professional Conduct Rule 8.4(g).<sup>1</sup> In general terms, the rule prohibits lawyers from engaging in conduct that tends to degrade or demean a person based on his or her gender or other attribute. The Indiana Supreme Court added this provision into Indiana’s rules in 2001,<sup>2</sup> and it is similar to provisions

---

\* Staff Attorney, Indiana Supreme Court Disciplinary Commission. J.D., 1987, Indiana University School of Law—Indianapolis. The opinions expressed herein are solely those of the author and do not represent a statement of law or policy by the Indiana Supreme Court, its staff, its Disciplinary Commission, or attendant agencies.

1. *In re Campiti*, 905 N.E.2d 408 (Ind. 2009); IND. PROF’L CONDUCT R. 8.4(g) (2009). It is professional misconduct for a lawyer to:

engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection. A trial judge’s finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

IND. PROF’L CONDUCT R. 8.4(g).

2. Charles M. Kidd, *Survey of the Law of Professional Responsibility*, 35 IND. L. REV. 1477, 1485 (2002).

enacted into the regulation of the profession in a number of states nationwide.<sup>3</sup> The rule, as it existed during survey period, first required the lawyer to be acting in a professional capacity. There is no associated Comment to this provision in Rule 8.4. Therefore, the term “professional capacity” as it is used in the rule’s text is not specifically defined. Next, the rule prohibits the substantive conduct of manifesting bias or prejudice based upon one of the qualities described in the rule including race and gender. Third, the rule recognizes that there are occasions when legitimate advocacy requires delving into a person’s ethnicity or other physical quality and such advocacy does not violate the rule.<sup>4</sup> Finally, the rule addresses concerns about a lawyer’s exercise of peremptory juror challenges on the basis of race or other impermissible grounds.

It is against this background that the supreme court evaluated the lawyer’s conduct in the disciplinary case of *In re Campiti*.<sup>5</sup> Presented to the court as a settlement, one of the agreed facts in *Campiti* was that the lawyer was representing the father in a child support modification hearing. In advocating for the father, the lawyer made pejorative references to the fact that the mother was not a U.S. citizen and was receiving her legal services at no charge. The case notes that there were facts in both aggravation and mitigation. Aggravating the sanction was that the mother believed the lawyer discriminated against her because she was a non-citizen and that he made the remarks in a public courtroom. The facts in mitigation included the lawyer’s lack of a prior disciplinary history, his cooperation with the Disciplinary Commission, his regret for “his emotional involvement in the case,” and his apology to the mother.<sup>6</sup> The court imposed a public reprimand.

The case has clear parallels to an earlier case involving this rule, *In re Thomsen*.<sup>7</sup> That case also involved a family law dispute in which the respondent lawyer represented the husband. During her representation of the husband, the lawyer made repeated references to the fact that the mother was associating with an African-American man.<sup>8</sup> The comments were unnecessary and inappropriate in the context of the litigation.<sup>9</sup> The tactic appeared to be an attempt to introduce

---

3. See CAL. PROF’L CONDUCT R. 2-400(B); D.C. PROF’L CONDUCT R. 9.1; MO. PROF’L CONDUCT R. 4-8.4(g); VT. PROF’L CONDUCT R. 8.4. The Iowa Supreme Court’s take on this rule at the time also contained a prohibition against sexual harassment by a lawyer. See IOWA PROF’L CONDUCT R. 32:8:4(g).

4. Developing hypothetical situations around this question should be generally easy. In a criminal prosecution, a defense lawyer might have a strategic reason for challenging an identification witness’s recollection of the specific race or physical features of an accused. In a family law case, a party’s religious or cultural qualities might be an area of legitimate inquiry for determining what are the best interests of any children from the relationship. The legitimacy of the advocacy must always be evaluated in the context in which it arises.

5. 905 N.E.2d 408, 408 (Ind. 2009).

6. *Id.*

7. 837 N.E.2d 1011 (Ind. 2005).

8. *Id.* at 1011-12.

9. *Id.* at 1012.



undue racial animus into the proceeding with the hoped-for effect of prejudicing the court in her client's favor. The end product for the lawyer was a disciplinary sanction for violating Rule 8.4(g). As with *Campiti*, the lawyer in *Thomsen* had no discernible purpose for injecting the subject of ethnicity into the dispute other than to inflame the participants. In the circumstances of these cases, there is no question whether the lawyers were acting in their professional capacities.

## II. LAWYER ADVERTISING: THE "ATTORNEYS OF ABOITE," ADVERTISING PAST SUCCESSES, AND ADVERTISING AS A LIMITED LIABILITY ENTITY

The Indiana Supreme Court also imposed sanctions of public reprimand of three lawyers in an advertising case. In *In re Loomis*,<sup>10</sup> three lawyers practiced under the name "Attorneys of Aboite, LLC"<sup>11</sup> in Allen County. Specifically, the lawyers were practicing in a form where each of the lawyers represented clients individually and not in the form of limited liability entity.<sup>12</sup> In the major feature of the case, the lawyers had professional documents, telephone directory listings, advertisements, an Internet website, and other items all denominated with the name of "Attorneys of Aboite." The case was presented to the court on an agreed resolution and the respondent lawyers received credit for having no prior disciplinary history and cooperating with the Disciplinary Commission's investigation. The agreed violations include violations of Rules 7.2(b),<sup>13</sup> 7.5(a),<sup>14</sup> and 7.5(b).<sup>15</sup> In its Published Order Approving Statements of Circumstances and Conditional Agreements for Discipline, the court pointed out that the use of the identifier "Attorneys of Aboite" and its variations constituted practicing under a trade name and constituted a violation of the rules.<sup>16</sup> In support of its orders, the court observed, "[t]he impropriety 'Attorneys of Aboite' should have been apparent from *In re Miller*."<sup>17</sup> In *Miller*, a one-year suspension from the practice of law sanction was imposed on the lawyer for practicing under the name "Area Attorneys."<sup>18</sup> Thus, the inclusion of a geographic identifier in the name of the

---

10. 905 N.E.2d 406 (Ind. 2009).

11. Aboite is a township on the west side of Fort Wayne.

12. *In re Loomis*, 905 N.E.2d at 407.

13. IND. PROF'L CONDUCT R. 7.2(a). Indiana rules prohibit the use of, any form of a public communication (advertisement) containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim. *Id.*

14. IND. PROF'L CONDUCT R. 7.5(a). Indiana rules prohibit the use of professional cards or other professional documents containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim. *Id.*

15. IND. PROF'L CONDUCT R. 7.5(b). Indiana rules prohibit the "practice under a name that is misleading as to the identity, responsibility, or status of those practicing thereunder, or is otherwise false, fraudulent, misleading, deceptive, self-laudatory or unfair" which includes practicing "under a trade name." *Id.*

16. *In re Loomis*, 905 N.E.2d at 407 (citing *In re Miller*, 462 N.E.2d 76 (Ind. 1984)).

17. *Id.*

18. *In re Miller*, 462 N.E.2d at 78.

law practice was by itself sufficient to constitute practicing under a trade name. The agreed to violations also made plain that practicing under a trade name constituted advertising that was false, misleading or deceptive under the rules.<sup>19</sup>

There is a second issue in the case with the potential for having a broader application for the bar at large. The court's order notes that the use of the LLC designation was an indication to the public that the lawyers practiced together in the form of a limited liability company and not simply practicing as space sharers.<sup>20</sup> It was important in the court's analysis that the respondent lawyers implied to the public that these lawyers had complied with the requirements of Admission and Discipline Rule 27.<sup>21</sup> Compliance with this rule is not pro forma but has real and identifiable consequences for the law firm. "These requirements include that the LLC maintain adequate professional liability insurance or other form of adequate financial responsibility for the protection of clients and that the State Board of Law Examiners investigated the LLC members and certified the LLC."<sup>22</sup>

Mere compliance with Indiana's corporations act<sup>23</sup> is insufficient for law firms to pass muster as limited liability entities. Lawyers seeking to practice in firms—or, as here, advertise that they are practicing in limited liability entities—must pay scrupulous attention to the requirements of Admission and Discipline Rule 27 and comply with them. As the court noted in the *Loomis* order, these benefits include protection for clients in the form of adequate professional liability insurance.<sup>24</sup> The *Loomis* disciplinary order makes clear that the court views this as a technical or ministerial violation but an act of false and

---

19. *In re Loomis*, 905 N.E.2d at 407.

20. *Id.*

21. IND. ADMISSION & DISCIPLINE R. 27 provides, in pertinent part:

Section 1. General Provisions. One or more lawyers may form a professional corporation, limited liability company or a limited liability partnership for the practice of law under Indiana Code 23-1.5-1, IC 23-18-1 and IC 23-4-1, respectively.

(a) The name of the professional corporation, limited liability company or limited liability partnership shall contain the surnames of some of its members, partners or other equity owners followed by the words "Professional Corporation," "PC," "P.C.," "Limited Liability Company," "L.L.C.," "LLC," "Limited Liability Partnership," "L.L.P.," or "LLP," as appropriate. Such a professional corporation, limited liability company, or limited liability partnership shall be permitted to use as its name the name or names of one or more deceased or retired members of a predecessor law firm in a continuing line of succession, subject to Rule of Professional Conduct 7.2.

22. *In re Loomis*, 905 N.E.2d at 407.

23. Indiana Code sections 23-1.5-1-1 to -5-2 (2007 & 2009 Supp.) covers the formation of Professional Corporations in the Indiana Code. Indiana Code sections 23-18-1-1 to -13-1 (2007 & Supp. 2009) covers the formation of limited liability companies in the Indiana Code.

24. Indiana Rule for Admission and the Discipline of Attorneys 27 section 1(g)(1) sets the specific terms of coverage for professional liability for firms practicing as P.C.'s, L.L.P.'s and L.L.C.'s.



misleading advertising.<sup>25</sup> By identifying itself as a limited liability entity, a law firm (of any size) warrants to the public that the firm protects clients' interests when in fact those interests are not protected. This failure to complete registration through the Board of Law Examiners can presumably stand as misconduct and its own.

The opinion also referenced a disciplinary cases involving lawyer advertising from just before the survey period. In another case involving more than one lawyer, *In re Benkie*,<sup>26</sup> the respondent lawyers and the Disciplinary Commission presented their case to the court on stipulated facts and exhibits. The case involved two brochures that lawyers used to solicit clients to the firm.<sup>27</sup> The brochures were entitled "When You Need A Lawyer" and "We Work For You."<sup>28</sup> The firm sent the first brochure to the Commission in 1996 with a letter seeking approval. The Disciplinary Commission responded that it did not render advisory opinions on the propriety of targeted solicitations and simply filed the brochure.<sup>29</sup> The firm sent the "We Work For You" brochure in 2001 and revised versions of both were filed in 2003 and 2004.<sup>30</sup> The Disciplinary Commission occasionally sent letters to lawyers advising them that they should change the language of their submissions to comply with the rules. These respondents did not receive any such advisement.<sup>31</sup> The respondent lawyers were charged with violating Indiana Professional Conduct Rules 7.2(b),<sup>32</sup> 7.2(c)(3),<sup>33</sup> 7.2(d)(2),<sup>34</sup> and 7.3(c).<sup>35</sup>

In a per curiam opinion, the court went through each of the challenged statements and delineated why each statement either breached the rule or was permissible.

#### A. "Commitment to Obtaining the Best Possible Settlement"

The Disciplinary Commission charged the respondents with a violation of the rules believing this statement was akin to one from a 2000 disciplinary action.<sup>36</sup>

---

25. *In re Loomis*, 905 N.E.2d at 407.

26. 892 N.E.2d 1237 (Ind. 2008).

27. *Id.* at 1239.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. IND. PROF'L CONDUCT R. 7.2(b).

33. IND. PROF'L CONDUCT R. 7.2(c)(3) (prohibiting the use of a statement that "is intended is likely to create an unjustified expectation").

34. IND. PROF'L CONDUCT R. 7.2(d)(2) (prohibiting the use of a public communication that "contains statistical data or other information based on past performance or prediction of future success").

35. IND. PROF'L CONDUCT R. 7.3(c) (prohibiting sending a solicitation without displaying "the words 'Advertising Material'").

36. *In re Wamsley*, 725 N.E.2d 75, 77 (Ind. 2000). The respondent lawyer had advertised using the statement "Best possible settlement . . . Least amount of time." *Id.* at 76. That was found

The respondent lawyers in *Benkie* argued that it was not a violation to make a commitment to clients to obtain the best possible settlement for clients and the supreme court agreed.<sup>37</sup> The court noted that the use of the term “commitment” was what every client had a right to expect and did not, therefore, constitute a violation of the rules.<sup>38</sup>

### *B. Descriptions of Prior Representations*

The Commission charged the respondents with violating Rule 7.2(d)(2)<sup>39</sup> for listing short descriptions of prior successful representations in their brochures. The respondent lawyers argued that the descriptions had been excerpted from newspaper articles and were thus already before the public.<sup>40</sup> The court pointed out that there was no exception in the text of the rule and the “selective use and editing” could be misleading, might be inaccurate and could lead to unjustified expectations by potential clients.<sup>41</sup>

### *C. “Legal Advertisement”*

Under Rule 7.3(c), lawyers who use targeted solicitations like those at issue in this case are required to display the words “Advertising Material” conspicuously on the face of the solicitation and on the outside of any envelope containing the solicitation.<sup>42</sup> The respondent lawyers admitted that this was a violation of the rules, but noted that it was merely technical and inadvertent. The supreme court took exception to this characterization and noted, “[u]se of the phrase ‘Legal Advertisement’ may create the impression that the Commission or some other body had reviewed it and found it to be ‘legal.’”<sup>43</sup> Put another way, the language of the rule, viz. “Advertising Material,” has a relatively plain meaning when compared to phrases like “Legal Advertisement” or “Lawful Advertisement” or “Legal Solicitation” that have double meanings that could confuse potential clients, either inadvertently or intentionally, into believing that the solicitation has somehow passed someone’s official muster. It is a fair

---

to violate the rules.

37. *In re Benkie*, 892 N.E.2d 1237, 1240 (Ind. 2008).

38. *Id.*

39. IND. PROF’L CONDUCT R. 7.6(d)(2).

40. *In re Benkie*, 892 N.E.2d at 1240.

41. *Id.*

42. IND. PROF’L CONDUCT R. 7.3(c) provides in pertinent part:

(c) Every written, recorded, or electronic communication from a lawyer soliciting professional employment from a prospective client potentially in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words “Advertising Material” conspicuously placed both on the face of any outside envelope and at the beginning of any written communication, and both at the beginning and ending of any recorded communication.

43. *In re Benkie*, 892 N.E.2d at 1240.



reading of the court's opinion in this case to conclude that the court mandates strict compliance with the language of rule 7.3(c).

*D. Lack of Warning or Assistance from the Commission*

The respondent lawyers in this case complained to the Indiana Supreme Court that they had discovered that a staff attorney for the Commission had informally approved a solicitation letter submitted by another law firm. The court noted that the propriety of the other letter was not before them and would not change the court's determination of these lawyers' violations of the rules.<sup>44</sup> The court returned to this subject later in their opinion<sup>45</sup> and noted that Rule 7.3(c) required the filing of targeted solicitations with the Disciplinary Commission, but it did not require the Commission to review such submissions and pass upon their compliance with the rule.<sup>46</sup> In the court's view, one of the benefits of requiring that these solicitations be filed with the Disciplinary Commission was that it encouraging self-policing by the profession. It also afforded the staff of the Disciplinary Commission to occasionally detect problematic solicitations and warn those of the need to correct their solicitations.<sup>47</sup> "We do not wish to discourage this service to the bar and to the public, even though it cannot extend to every lawyer communication filed with the Commission."<sup>48</sup> In the end, each of these lawyers received public reprimand as a sanction for their misconduct.

### III. CRIMINAL CONDUCT

It is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer

---

44. *Id.*

45. *Id.* at 1241.

46. IND. PROF'L CONDUCT R. 7.3(c) provides in pertinent part,

A copy of each such communication shall be filed with the Indiana Supreme Court Disciplinary Commission at or prior to its dissemination to the prospective client. A filing fee in the amount of fifty dollars (\$50.00) payable to the "Supreme Court Disciplinary Commission Fund" shall accompany each such filing. In the event a written, recorded or electronic communication is distributed to multiple prospective clients, a single copy of the mailing less information specific to the intended recipients, such as name, address (including email address) and date of mailing, may be filed with the Commission. Each time any such communication is changed or altered, a copy of the new or modified communication shall be filed with the Disciplinary Commission at or prior to the time of its mailing or distribution. The lawyer shall retain a list containing the names and addresses, including email addresses, of all persons or entities to whom each communication has been mailed or distributed for a period of not less than one (1) year following the last date of mailing or distribution. Communications filed pursuant to this subdivision shall be open to public inspection.

47. *In re Benkie*, 892 N.E.2d at 1241.

48. *Id.*

in other respects.”<sup>49</sup> This is the full text of the rule as it existed during the survey period. The simple and understandable statement is present in a similar form in every U.S. jurisdiction’s law of professional regulation for lawyers. One’s first thought in considering this rule would be the impropriety of having a member of the bar that committed theft or perhaps a crime of violence. Certainly those types of criminal acts occur from time to time, and during the survey period in Indiana (and perhaps a little bit before) there have been a number of lawyers who have been the subjects of disciplinary action under this rule for a similar kind of misconduct. Consider the cases of *In re Toland*,<sup>50</sup> *In re Collins*,<sup>51</sup> *In re Followell*,<sup>52</sup> *In re Tolliver*,<sup>53</sup> *In re Butsch*,<sup>54</sup> *In re Woods*,<sup>55</sup> *In re Felts*,<sup>56</sup> and *In re Katic*.<sup>57</sup> All of these 2009 disciplinary actions involved lawyers who were the subject of criminal cases involving some form of intoxicant.

Although the sanctions in these cases ranged from a public reprimand in one case<sup>58</sup> to a stayed suspension with three years of subsequent probation in others,<sup>59</sup> the point is that this is a noteworthy number of cases of this type. In resolving these cases, the terms of final probation commonly include evaluation and treatment by appropriate professionals and a period of reporting to the court as to their progress.<sup>60</sup> Indiana has a sophisticated system for aiding members of the bench and bar in dealing with these problems through the Judges and Lawyers Assistance Program (JLAP).<sup>61</sup> This confidential program is provided through the auspices of the supreme court and details and contact information are available through the court’s website.<sup>62</sup>

#### IV. “COMMON” PRACTICE

During the survey period, the Indiana Supreme Court addressed an issue that it is only rarely called upon to address: when lawyers practice together, under

---

49. IND. PROF’L CONDUCT R. 8.4(b).

50. 907 N.E.2d 997 (Ind. 2009) (possession of marijuana).

51. 904 N.E.2d 660 (Ind. 2009) (operating a vehicle while intoxicated).

52. 905 N.E.2d 370 (Ind. 2009) (operating a vehicle with a BAC of .08 or more).

53. 907 N.E.2d 967 (Ind. 2009) (operating while intoxicated).

54. 899 N.E.2d 647 (Ind. 2009) (operating a vehicle with a BAC or .15 or more).

55. 899 N.E.2d 646 (Ind. 2009) (operating while intoxicated and public intoxication).

56. 902 N.E.2d 255 (Ind. 2009) (operating a vehicle with a BAC of .15 or more).

57. 899 N.E.2d 648 (Ind. 2009) (public intoxication by appearing in court with a BAC of .201).

58. *In re Toland*, 907 N.E.2d 997 (Ind. 2009).

59. *In re Butsch*, 899 N.E.2d 647 (Ind. 2009).

60. *E.g.*, *In re Felts*, 902 N.E.2d 255.

61. See Judges and Lawyers Assistance Program (JLAP), <http://www.in.gov/judiciary/ijlap> (last visited May 22, 2010).

62. The legal foundations for the mission and structure of JLAP are found at Indiana Admission to the Bar and Discipline of Attorneys Rule 31.



what circumstances can they be considered a law firm? In *In re Recker*,<sup>63</sup> the Disciplinary Commission charged a lawyer with violating the Rules of Professional Conduct dealing with revelations of client information and having conflicting interests.<sup>64</sup> Although in the end the court found in the lawyer's favor, it published a per curiam opinion to explain its view of the dispute. The primary issue was whether James Recker and another lawyer, Laura Paul, were "associated in a firm" at the time of the relevant events such that Paul's client was also deemed to be Recker's client.<sup>65</sup>

Both lawyers were part-time public defenders in Putnam County. The Putnam Circuit Court contracted with Recker to provide indigent defense in that court and Paul had a similar contract to be the public defender in that court.<sup>66</sup> Both lawyers maintained their own private offices with Recker's in Indianapolis and Paul's in Terre Haute. Putnam County provided office space within its courthouse for the public defenders. Due to budget constraints, the county did not provide doors to their respective cubicles and only provided one incoming telephone line. Conversations could not normally be heard between one cubicle and the other. The county also provided stationery listing both courts with the words "Office of the Public Defender."<sup>67</sup> The court also provided secretarial assistance including an office manager who kept all of the public defender files in a central location and only allowed attorneys who had entered an appearance in that case to check out the case's files.

Recker was appointed to represent a criminal defendant whom the supreme court identified as "AB" who was charged with battery resulting in the death of his girlfriend's child.<sup>68</sup> He was also appointed to represent AB in a Child In Need Of Services (CHINS) case involving the client's own child. Thereafter, AB hired another attorney, James Holder, to represent him in his criminal case. Recker, however, continued to represent AB in his CHINS case.<sup>69</sup>

Paul, meanwhile, was appointed to represent client XY in a criminal case in the Putnam Superior Court. AB, XY, and another defendant were housed in the same holding cell in the Putnam County jail.<sup>70</sup> At some point, the Putnam County Prosecutor met with Paul in the public defender office and told her that her client, XY had passed a note to the Sheriff stating that AB had told XY details of the alleged battery but XY wanted to speak with his attorney before he revealed more information. Paul believed the Prosecutor was suggesting a plea deal for XY in exchange for information about AB.<sup>71</sup> Recker was not in the office at the time of this conversation.

---

63. 902 N.E.2d 225 (Ind. 2009) (per curiam).

64. *Id.* at 227.

65. *Id.* at 226.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

When Recker returned, Paul related her conversation with the Prosecutor and mentioned AB's name but not XY's. Because she had not experienced this situation before, Paul sought Recker's advice as to what she should do. Paul did not know Recker represented AB. Recker, meanwhile, believed the client Paul was representing was a private client and, therefore, not a public defender client. After his conversation with Paul, Recker telephoned Holder and told him that it appeared AB was talking about his case to his cellmates. Holder, in turn, contacted AB who then suspected the informant was XY. When the Prosecutor learned of the situation, he contacted the jail and had XY removed from the cell. Eventually, AB was charged with murder, XY testified at this trial and AB was convicted.<sup>72</sup>

The Disciplinary Commission charged Recker with violations of the Rules of Professional Conduct for revealing information relating to the client's representation without the client's informed consent,<sup>73</sup> using information relating to the representation of a client to the disadvantage of the client without the client's informed consent,<sup>74</sup> and with violating the rule that provides that while lawyers are associated in a firm, certain prohibitions that apply to any one of them applies to all of them.<sup>75</sup> The key concept in the Disciplinary Commission's charging theory was that the facts supported a view that Recker and Paul, in their roles as public defenders, were practicing as a law firm. Under the rules, a "[f]irm" or "[l]aw [f]irm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation *or other organization*.<sup>76</sup>

The supreme court examined the comment to the rule to address the issue of whether these lawyers could be said to be practicing as a firm. The determination of firm status depends on specific facts that can lead to the imputation of firm status on lawyers' practice arrangement. For example, lawyers in even occasional or incidental practice could be found to be practicing as a firm if they present themselves to the public in a way that suggests they are a firm or conduct themselves in a way that suggests they are a firm.<sup>77</sup> One of the facts relevant to this evaluation is the extent to which the lawyers share or otherwise have access to information about their clients.<sup>78</sup>

This issue was first address by the Indiana Supreme Court in the case of *In*

---

72. *Id.* at 227.

73. IND. PROF'L CONDUCT R. 1.6.

74. IND. PROF'L CONDUCT R. 1.8(b). Note that the language of this rule and rule 1.6, does not require that the information at issue be "confidential." Lawyers often talk of "privileged" or "confidential" communications between lawyer and client. To be sure, that sort of information must be held close to the lawyer's vest. Nevertheless, these rules do not require that there be any sort of secret quality to the information disclosed in order to constitute a violation of these rules.

75. IND. PROF'L CONDUCT R. 1.8(k).

76. IND. PROF'L CONDUCT R. 1.0 (emphasis added).

77. *In re Recker*, 902 N.E.2d at 227-28.

78. *Id.*



*re Sexson*.<sup>79</sup> In *Sexson*, the respondent lawyer, a lawyer named Thompson and four other lawyers maintained an office at a common location. They shared a secretary, common letterhead, three phone lines and left their office doors unlocked and the doors open. Conversations in each individual office could be heard in the common hallway. Thompson represented a couple named Zimmerman as plaintiffs in a personal injury case. During the pendency of that case, the Zimmermans filed for a marriage dissolution and Mrs. Zimmerman hired Sexson to represent her. At the conclusion of the personal injury case, Mr. Zimmerman went to Thompson's office to collect his share of the settlement and was greeted by Sexson with a restraining order in the dissolution case preventing him from spending his share of the proceeds.<sup>80</sup> It was reasonable, the court found, for Mr. Zimmerman to believe both that Thompson and Sexson were part of a law firm and that Sexson had engaged in an adverse representation.<sup>81</sup>

Irrespective of the common elements with *Sexson*, the facts in *Recker* were sufficiently distinguishable to prevent the finding that Recker and Paul were not practicing as a firm in the public defender office, the court held.<sup>82</sup> Notably, the lawyers did not have any choice about the office arrangement or organizational structure of the office in which they practiced. They did not hold themselves out as being in practice together and only took on cases in the courts to which they were assigned. One important factual dispute in the case was the level of access each attorney had to the other's files, but the Hearing Officer who heard the case in the first instance determined that the court-provided secretary handled all the files in an appropriate fashion and the Indiana Supreme Court agreed with this finding.<sup>83</sup> The court held:

There is no uniform system of providing indigent defense in Indiana's 92 counties. For example, indigent defense in Marion County is provided by the attorneys employed by the Marion County Public Defender Agency. In some counties, attorneys providing such services may be considered to comprise one law firm. Under the Putnam County system, however, the public defenders simply share office space and support services provided for their use by the courts. They are not deemed to be members of a firm, at least for the purpose of the rule that information acquired by one lawyer in a firm is attributed to another.

Regardless of whether public defenders in a particular county are considered to be members of a firm, it is imperative that they consider the implications their relationship have on their professional duties to their clients. If the attorneys are deemed to be members of a firm, avoiding improper conflicts of interest must be given a high priority. If

---

79. 613 N.E.2d 841 (Ind. 1993).

80. *Id.* at 842.

81. *Id.* at 843.

82. *In re Recker*, 902 N.E.2d at 228.

83. *Id.*

the attorneys are considered to be practicing independently, they must take care not to share improperly confidential information about their clients with each other. Attorneys sharing office space, as public defenders or in other contexts, may benefit from consulting with each other about legal issues, but this can be done ethically only after first determining that the interests of both attorneys' clients are not compromised.<sup>84</sup>

The court then determined that Paul gave Recker information from XY who was acting against Recker's client's interests.<sup>85</sup> Because XY was not his client, Recker did not violate the Rules of Professional Conduct by passing on the information he had received. Paul was not charged with committing misconduct and the court expressed no opinion on her actions.<sup>86</sup>

The decision, however, was not unanimous. Justice Frank Sullivan dissented with an opinion in which he would have found the Putnam County Public Defender's Office was practicing as a law firm. Justice Sullivan wrote that he believed "that the [c]ourt employs an overly technical, indeed, near-sighted, definition of 'firm' and in doing so loses sight of the principal interest at stake . . . : the inviolability of client confidences."<sup>87</sup>

The dissent noted that the test was whether the lawyers presented themselves to the public in a way that suggested they were practicing as a firm. Justice Sullivan posited that because the inviolability of client confidences is one of the "bedrocks of our profession," he would have applied this test from the perspective of the reasonable client and not the reasonable lawyer.<sup>88</sup> Analyzing the same facts as the majority, the dissent observed that the lawyers practiced in adjoining cubicles in a single office with a sign noting "Public Defender's Office."<sup>89</sup> There were no internal doors dividing the offices, a common workspace was present for the secretarial staff, the files of both lawyers were present together, a caller to the office would talk to the same support staff for each lawyer. Paul, he observed, must have thought they were in the same firm else she would not have consulted on such a matter with Recker.<sup>90</sup> Under the majority opinion, he notes, if Recker had heard a confidential communication between Paul and a client, he would have had no duty to keep confidential the information he heard.<sup>91</sup>

After reviewing the literature, Justice Sullivan observed,

Perhaps the [c]ourt is concerned that the public defender arrangement here is a common one in our state's Balkanized system of trial courts and

---

84. *Id.* at 229.

85. *Id.*

86. *Id.*

87. *Id.* at 230 (Sullivan, J., dissenting).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*



that holding it to be a firm would have negative consequences. If so, I do not understand the argument. Even if the two lawyers here are not a "firm," either one is likely to have conflicts of interest in particular criminal cases from time to time that require the appointment of other counsel. Viewed from the perspective of a large county with a public defender office that is undeniably a "firm," lawyers in such an office are clearly prohibited from representing clients with inconsistent defenses, regularly requiring other counsel to be secured. While the necessity of securing "conflict" counsel presents some negative fiscal and other consequences in counties large and small, they are part of the price that our legal system has long paid to maintain the inviolability of client confidences in criminal cases. They do not justify a deviation from that principle in the case of this particular public defender's office.<sup>92</sup>

The dissent concluded that the facts as adduced in this case supported the conclusion that the office in question constituted a law firm and that the respondent lawyer had violated the rules as alleged by the Disciplinary Commission.<sup>93</sup>

The case is important for its examination of some of the key ethical dilemmas in the delivery of legal services to indigent criminal defendants. The opinions, both the majority and the dissent, highlight some of the important elements for consideration on each side. Justice Sullivan's dissent makes the point that if a lawyer in one firm sends a fax containing confidential client information to a lawyer in another firm, the public would not normally be misled into believing that these two lawyers were practicing as a law firm.<sup>94</sup> In this case, the lawyers shared adjacent cubicles without doors. Extending that logic, a reasonable inference could be made that their practice arrangement was such that the duty of confidentiality applied to both lawyers. Also, it was important in this case that the secretarial staff was careful to only share files with lawyers who had appeared for the defendant.<sup>95</sup> This step helped insulate the lawyers from imputed firm status and the majority carefully examined these procedures before reaching that conclusion.

Even a casual reading of the case leaves the impression that, in future cases, it would not take large variations from the fact pattern presented in *Recker* to result in a finding of misconduct for the lawyers involved. Note also that both opinions are conscious of the lack of uniformity in the way indigent criminal

---

92. *Id.* at 231.

93. *Id.*

94. *Id.* at 230.

95. *Id.* at 226. There are legitimate reasons for using the support staff as gatekeepers in this fashion. If, hypothetically, a witness in a criminal prosecution had been previously represented by the public defender's office in an unrelated criminal prosecution, a lawyer might be tempted to investigate the prior representation for information that might impeach the witness's credibility or character. That would clearly be a misuse of client information. Using a secretary to screen access to files could be an important safeguard for client information.

defense services are provided throughout Indiana.<sup>96</sup> There does not appear to be any suggestion in *Recker* of a specific solution from the supreme court for resolving situations like this that may arise throughout the state.

#### V. ALAS NEGLECT: IT IS ALWAYS WITH US

A comment to Rule 1.3, suggest that “[p]erhaps no professional shortcoming is more widely resented than procrastination.”<sup>97</sup> Thus reads one of the best known observations made in the Rules of Professional Conduct to Rule 1.3 which imposes a duty on all lawyers to be diligent in the handling of entrusted matters.<sup>98</sup> As noted in prior survey articles on professional responsibility, neglect of client matters is one of the most pernicious and pervasive of all misconduct by attorneys resulting in disciplinary action.<sup>99</sup> One case, *In re Maldonado-Rosales*,<sup>100</sup> is noteworthy due to the pattern of neglect and related misconduct associated with the attorney’s actions. In this four count disciplinary matter, the respondent lawyer engaged in serious misconduct in connection with several clients.<sup>101</sup>

In Count I, the respondent represented a client on a contingency fee basis as a plaintiff in a personal injury case. In May 2005, she received a settlement check for nearly \$4,400.<sup>102</sup> She properly deposited the funds in her trust account but later withdrew \$4,300 and put the money in her firm’s operating account (a violation of the rules) and spent the money for personal purchases.<sup>103</sup> She overdrew both accounts and, in June 2005, issued a check for about \$2,900 to her client, which, of course, bounced.<sup>104</sup> She then lied to her client and to the Disciplinary Commission about her delay in disbursing the settlement money, claiming she was waiting on the underlying check to clear.<sup>105</sup>

The Disciplinary Commission charged the respondent with violating the

96. *Id.* at 229 (majority) and 231 (Sullivan, J., dissenting).

97. IND. PROF’L CONDUCT R. 1.3, cmt. 3.

98. IND. PROF’L CONDUCT R. 1.3 ( “A lawyer shall act with reasonable diligence and promptness in representing a client.”).

99. Charles M. Kidd & Dennis K. McKinney, *Survey of 1996 Developments in the Law of Professional Responsibility*, 30 IND. L. REV. 1251, 1252-55 (1997).

100. 904 N.E.2d 209 (Ind. 2009).

101. *Id.* at 209-10.

102. *Id.*

103. Indiana Rule of Professional Conduct 1.15(a) provides:

A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. Funds shall be kept in a separate account maintained in the state where the lawyer’s office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

104. *Maldonado-Rosales*, 904 N.E.2d at 209.

105. *Id.*



Rules of Professional Conduct 1.5(c),<sup>106</sup> 1.15(a),<sup>107</sup> 8.1(a),<sup>108</sup> 8.1(b),<sup>109</sup> 8.4(b),<sup>110</sup> and 8.4(c).<sup>111</sup> Standing by itself, Count I of the disciplinary action constitutes a serious breach of professional ethics and would result in a significant sanction in its own right. There were, however, three additional counts in the case.

In Count II, the respondent lawyer was again hired to represent a client in a personal injury case.<sup>112</sup> In pursuing the case, she made a settlement demand without the client's knowledge or consent. She also had the client deliver a check for \$107 to her office for a filing fee for his case. But she failed to file the complaint before the statute of limitations ran.<sup>113</sup> She then wrote to the client returning his check and falsely stated that she had not received either his filing fee or sufficient information about the case in time to allow her to file a timely complaint.<sup>114</sup>

In Count III, the respondent charged a client a flat fee of \$500 to represent him in a civil collection action wherein the client was seeking about \$8,000 in damages.<sup>115</sup> She failed to respond to a discovery request, failed to respond to a motion for summary judgment and failed to notify the client when summary judgment was entered against him. Then, she failed to notify the client of a hearing on proceedings supplemental and failed to appear at the hearing. She

---

106. IND. PROF'L CONDUCT R. 1.5(c) ("Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.").

107. IND. PROF'L CONDUCT R. 1.15(a):

A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person.

108. IND. PROF'L CONDUCT R. 8.1(a) ("An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not: (a) knowingly make a false statement of material fact.").

109. IND. PROF'L CONDUCT R. 8.1(b):

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

110. IND. PROF'L CONDUCT R. 8.4(b) ("It is professional misconduct for a lawyer to: (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.").

111. IND. PROF'L CONDUCT R. 8.4(c) ("It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.").

112. *In re Maldonado-Rosales*, 904 N.E.2d 209 (Ind. 2009).

113. *Id.*

114. *Id.*

115. *Id.*

finally charged the client an additional \$500 to represent him in “an unsuccessful motion to set aside the judgment.”<sup>116</sup>

In Count IV, the client entered into a contract with a wedding photographer who subsequently failed to show up and photograph the wedding.<sup>117</sup> In January 2006, she hired the respondent for a flat fee of \$1,500 to sue the photographer. The respondent told the client she could recover eighty percent of the \$25,000 cost of her wedding. The defendant photographer did not file an answer to the complaint but the respondent did not take any further action to pursue the claim.<sup>118</sup> The client eventually fired the respondent and demanded return of her \$1,500. Her case was dismissed in July 2008 for failing to prosecute the claim. The respondent failed to refund any part of the fee.<sup>119</sup>

For her misconduct in Counts II, III, and IV, the respondent was charged with violating Rules 1.1,<sup>120</sup> 1.3,<sup>121</sup> 1.4(a)(1),(3) and (4),<sup>122</sup> 1.4(b),<sup>123</sup> 1.5(a),<sup>124</sup> and 1.16(d).<sup>125</sup> In a nutshell, this combination of rule violations charges the lawyer with incompetent representation, failing to communicate with clients, failing to respond to requests for information from clients, charging an unreasonable fee, and failing to either preserve the client’s interests or refund unused fees upon the

---

116. *Id.*

117. *Id.* at 209-10.

118. *Id.*

119. *Id.*

120. IND. PROF’L CONDUCT R. 1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

121. IND. PROF’L CONDUCT R. 1.3 (“A lawyer shall act with reasonable diligence and promptness in representing a client.”).

122. IND. PROF’L CONDUCT R. 1.4(a):

A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information.

123. IND. PROF’L CONDUCT R. 1.4(b) (“(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).

124. IND. PROF’L CONDUCT R. 1.5(a) (“A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.”).

125. IND. PROF’L CONDUCT R. 1.16(d) provides,

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.



termination of the representation. Neglecting client matters and failing to communicate with clients are relatively common violations in disciplinary actions but the conduct in this case constituted seriously aggravated misconduct on the part of the lawyer. The respondent and the Disciplinary Commission agreed to settle the case based on a two-year suspension from the practice of law.<sup>126</sup> At the end of that period, the respondent lawyer can petition the Indiana Supreme Court for reinstatement to the practice of law.<sup>127</sup>

This case represents, in a microcosm, a life cycle of neglected matters. Note throughout the development of the case that the respondent lawyer had neglected the matters long before identifiable negative consequences actually befell their cases. Also this case was brought on multiple client matters. One of the facts stipulated by the respondent and the Disciplinary Commission was that the respondent had substantial personal and emotional problems at the time she practiced law.<sup>128</sup> Clearly, there was a problem internal to her law practice that was contributing to the problems that resulted in this disciplinary action. Neglect turned into lost claims. The situation then led to the respondent's deceitful conduct. The client's claims were lost or irreparably damaged. The end result was loss of the respondent's ability to practice law. This exposition represents a good roadmap of the journey neglected matters take. This is not a desirable end for either the client or the lawyer under any circumstance.

#### CONCLUSION

This is certainly not a comprehensive list of the disciplinary matters or other lawyer cases decided during the survey period. As of the publication of this Article, there are already cases fit for consideration in the area of professional responsibility for next year. There is enough herein that should cause many prudent lawyers to evaluate how they are practicing law, e.g., the form of the practice and compliance with the procedures of the Board of Law Examiners, the presentation of the firm to the public, and the truthfulness needed for the daily practice of law. Staying current on ethical considerations for practicing lawyers should be something that gets attention periodically throughout the year and not just a matter for one's occasional continuing legal education commitment.

---

126. *In re Maldonado-Rosales*, 904 N.E.2d 209, 209-10 (Ind. 2009).

127. *Id.* at 210-11.

128. *Id.* at 210.





# RECENT DEVELOPMENTS IN INDIANA REAL PROPERTY AND RELATED AREAS OF LAW

MARCI A. REDDICK\*

As any first year law student quickly discovers, to say that property law is well settled is a gross understatement. With a foundation in English common law dating back centuries, property law provides few opportunities for courts to consider new issues. However, several cases presenting issues of first impression came before Indiana appellate courts during the survey period for this Article.

## I. CONVEYANCES

### A. Deeds

Two interesting cases concerning partitioning real property came before the Indiana Court of Appeals during the survey period. In *Ramer v. Smith*,<sup>1</sup> members of a family sought to partition property that had been conveyed to them.<sup>2</sup> Betty Smith and Richard Smith owned about seventy-eight acres of land and permitted Betty's daughter, Janice Ramer, and Janice's husband, Burdette, to construct a home on the land in 1998.<sup>3</sup> The Smiths conveyed a 6.6-acre tract of the land to Janice and Burdette on May 17, 2000.<sup>4</sup> The granting clause of the warranty deed ("Deed I") stated: "RICHARD W. SMITH and BETTY J. SMITH, husband and wife, . . . Conveys and warrants to BURDETTE RAMER and JANICE RAMER, husband and wife . . . ."<sup>5</sup> As the result of problems with the local zoning authority, the Smiths and the Ramers executed a second warranty deed ("Deed II"), and the granting clause stated: "RICHARD W. SMITH and BETTY J. SMITH, husband and wife, and BURDETTE RAMER and JANICE RAMER, husband and wife, . . . Conveys and warrants to: RICHARD W. SMITH, BETTY J. SMITH, BURDETTE RAMER, and JANICE RAMER, as Joint Tenants With right [sic] of Survivorship . . . ."<sup>6</sup> Richard died in November of 2004, and Betty filed a petition to partition the property two years later.<sup>7</sup>

The trial court concluded that Deed II conveyed a one-half joint tenancy interest in the property to the Smiths, which they held as tenants by the entireties, and a one-half joint tenancy interest to the Ramers, which they also held as

---

\* Partner, Taft Stettinius & Hollister LLP. B.A., 1978, Indiana University (double degree); J.D., 1984, Indiana University School of Law—Indianapolis. The author thanks Michele Richey, Associate, Taft Stettinius & Hollister LLP, for contributing her excellent editing skills to this Article.

1. 896 N.E.2d 563 (Ind. Ct. App. 2008).

2. *Id.* at 565.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 566.

7. *Id.*

tenants by the entirety.<sup>8</sup> The court also concluded that Betty succeeded to Richard's interest in the property upon his death.<sup>9</sup> The trial court did not adjust the partition of the property to include any alleged contribution made by the Ramers to its value.<sup>10</sup> Finally, the court ruled that the property could not be divided into equal shares without physically dividing the residence, and, as a result, it appointed a commissioner to sell the property at a public sale.<sup>11</sup>

The Indiana Court of Appeals noted that, as a general rule under Indiana law, where a deed conveys real estate to a married couple, they take the property as tenants by the entirety.<sup>12</sup> The court reasoned, therefore, that when two married couples take title to real estate jointly, "each couple takes an undivided one-half interest as tenants by the entirety, which they share as joint tenants with the other couple."<sup>13</sup> However, a conveyance to two married couples may be treated as a joint tenancy or as a tenancy in common between all four individuals if the deed unambiguously states such an intent.<sup>14</sup>

The court found that the granting clause in Deed II expressed the intent to convey the property to the parties as joint tenants, which treated the parties differently in their capacities as grantees than in their capacities as grantors.<sup>15</sup> As a result, the court concluded that Deed II gave Betty, Burdette, and Janice each a one-third undivided interest in the property as joint tenants.<sup>16</sup> Finally, the court recognized the longstanding rule of equity that joint tenants have an equal right to share in the real estate and an equal share upon partition, but that equitable adjustments are only permissible when property is held as tenants in common.<sup>17</sup> The court remanded the case to the trial court to determine the proper method of partitioning the property.<sup>18</sup>

A second case where the parties disputed the intent of the language in a deed included elements rivaling those that seem more likely to be found in a script for a reality television show. In *Hardy v. Hardy*,<sup>19</sup> a daughter sought the partition and sale of real estate while her father and brother requested reformation of a warranty deed to create a life estate for her father.<sup>20</sup> The father owned eighty acres of Cass County farmland, including a home on a ten-acre tract within the total acreage.<sup>21</sup> The father faced multiple methamphetamine drug charges in

---

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 567 (citing *Richards v. Richards*, 110 N.E. 103, 104 (Ind. App. 1915)).

13. *Id.* at 568.

14. *Id.*

15. *Id.*

16. *Id.* at 569.

17. *Id.* (citing *Cunningham v. Hastings*, 556 N.E.2d 12, 14 (Ind. Ct. App. 1990)).

18. *Id.* at 570.

19. 910 N.E.2d 851 (Ind. Ct. App. 2009).

20. *Id.* at 854.

21. *Id.* at 853.



Oklahoma and Indiana and owed five years of federal income taxes.<sup>22</sup> To avoid the possibility of being hit with a controlled substance excise tax if he was convicted in Indiana, the possible forfeiture of his real estate, a fine in Oklahoma, and the potential for a federal income tax lien attaching to the real estate, the father conveyed seventy acres of his land to his son and daughter as joint tenants with the right of survivorship.<sup>23</sup> The daughter, age seventeen, was not told of the conveyance.<sup>24</sup> She learned that she owned the property with her brother a year later when her father and brother asked her to quitclaim two acres to her brother and his then-wife to build a home.<sup>25</sup> She signed the quitclaim deed but did not receive the sale price of \$4,000 that her father promised to pay her for the property.<sup>26</sup> The father was convicted of methamphetamine offenses and was incarcerated in Oklahoma and Indiana.<sup>27</sup> At some point during his incarceration, the father conveyed the remaining ten acres of the farmland to his son to avoid forfeiture, seizure, or a tax lien.<sup>28</sup> In addition, father and son leased sixty-eight acres of the property for three years and collected over \$52,000 in rent without telling the daughter.<sup>29</sup> The rent proceeds were deposited into an account for the sole benefit of the father.<sup>30</sup>

The daughter filed a complaint requesting partition and sale of the real estate, an accounting from her brother, and a determination of whether she was entitled to any credits or reimbursements.<sup>31</sup> The son filed an answer requesting reformation of the deed to honor his father's intent to establish a constructive trust to protect the interests of father, son, and daughter.<sup>32</sup> The father joined the action later as a party defendant.<sup>33</sup> The father's former wife and the mother of the son and daughter testified before the trial court on behalf of the father that he had conveyed the seventy acres to the son and daughter intending to reserve a life estate for himself and that, upon his death, the daughter and son would inherit the land.<sup>34</sup>

The trial court awarded the daughter \$22,830, her share of the rent, and granted the daughter's request to partition the property.<sup>35</sup> The court further held that the son and daughter owned the property, but it could not be partitioned without damaging the owners' interests. Thus, the court ordered the property

---

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 853-54.

30. *Id.*

31. *Id.* at 854.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 855.

sold.<sup>36</sup> The father and son appealed.<sup>37</sup>

The facts of the case provided the perfect framework for the Indiana Court of Appeals to analyze the equitable doctrines of “unclean hands” and failure to “do equity.”<sup>38</sup> The court determined that the evidence clearly demonstrated that the father and son could not meet either equitable standard and, as a result, held that they were not entitled to the equitable remedy of reformation of the deed.<sup>39</sup> In addition, the court held that the language of the deed could not be construed as creating an implied trust requiring son and daughter to re-convey the property to the father.<sup>40</sup> The court concluded that the father’s fraudulent transfer to avoid creditors (including federal tax obligations), failure to have clean hands, and failure to do equity supported the trial court’s judgment that the property should be partitioned and sold.<sup>41</sup>

The race to the courthouse has rarely been as complicated as it was in the case of *Weathersby v. JPMorgan Chase Bank, N.A.*<sup>42</sup> In *Weathersby*, a bank brought a declaratory judgment action against another mortgagee and deed holder alleging that the mortgage and deed were invalid because they were recorded outside the chain of title.<sup>43</sup> The trial court granted summary judgment to the bank resulting in the appeal.<sup>44</sup>

Property in Gary, Indiana was transferred to the Blair Family Trust by a warranty deed recorded on June 25, 1997.<sup>45</sup> This transfer set the stage for the creation of the first chain of title to the property.

The Blair Trust transferred the property to the 5285 Adams Trust by a quitclaim deed dated October 8, 1998, recorded October 13, 1998.<sup>46</sup> Attorney Michael Delfine, who served as trustee for the Adams Trust, prepared and signed the deed.<sup>47</sup> Delfine transferred the property to Tony Blair, individually, via a trustee’s deed, which was recorded June 17, 1999.<sup>48</sup> Blair transferred the property back to the Adams Trust with a quitclaim deed dated and recorded July 19, 1999; however, he also transferred the property to Bessie Lewis by warranty deed dated November 23, 1999, recorded January 20, 2000.<sup>49</sup> Lewis gave JPMorgan Chase a mortgage on the property on the date that she received the

---

36. *Id.*

37. *Id.*

38. *Id.* at 856-57.

39. *Id.* at 858.

40. *Id.*

41. *Id.* at 859.

42. 906 N.E.2d 904 (Ind. Ct. App.), *reh’g denied*, 2009 Ind. LEXIS 1233 (Ind. July 22, 2009).

43. *Id.* at 905.

44. *Id.* at 907.

45. *Id.* at 906.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*



deed. The mortgage was also recorded on January 20, 2000.<sup>50</sup>

The second chain of title for the property was created when Delfine, also trustee of the Blair Trust, transferred the property by quitclaim deed to Financial Help & Consulting Services (FHCS) on July 24, 1998, recorded November 13, 1998. The transfer occurred a month after the quitclaim deed from the Blair Trust to the Adams Trust was recorded on October 13, 1998.<sup>51</sup> FHCS conveyed the property back to the Blair Trust by corporate warranty deed dated March 29, 1999, recorded April 9, 1999.<sup>52</sup> Then, on August 4, 1999, Delfine, in his capacity as trustee of the Blair Trust, gave a mortgage on the property to Harjit Sahi as security for the payment of a \$37,440.80 promissory note. That mortgage was recorded April 9, 1999.<sup>53</sup> Sahi filed a complaint to foreclose on the mortgage and obtained a judgment against the Blair Trust in September 2004.<sup>54</sup> Sahi purchased the property at a sheriff's sale and received a sheriff's deed dated March 4, 2005.<sup>55</sup>

Sahi transferred the property to Weathersby by warranty deed dated May 6, 2005, recorded May 26, 2005.<sup>56</sup> Weathersby gave PHH Mortgage Services a mortgage on the property dated May 25, 2005, recorded May 26, 2005.<sup>57</sup> PHH Mortgage Services assigned the mortgage to Mortgage Electronic Registration Systems, Inc. (MERS) less than two months later.<sup>58</sup>

Chase filed a declaratory action against Weathersby and MERS seeking a declaration that since the Weathersby deed and the MERS mortgage were recorded outside the proper chain of title, they were invalid.<sup>59</sup> Chase amended the complaint adding the Adams Trust as a defendant alleging it had no right, lien, or other interest in the property, and therefore, Lewis owned the property and Chase's mortgage was valid.<sup>60</sup> Chase then followed with a motion for summary judgment.<sup>61</sup> The trial court ruled in favor of Chase, invalidating the Weathersby deed and MERS mortgage.<sup>62</sup>

The Indiana Court of Appeals observed that to qualify as a bona fide purchaser, one must purchase the property "in good faith, for valuable consideration, and without notice of the outstanding rights of others."<sup>63</sup> The court noted that it recognizes both constructive and actual notice in analyzing

---

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 907.

62. *Id.* at 908.

63. *Id.* at 909 (quoting *Bank of New York v. Nally*, 820 N.E.2d 644, 648 (Ind. 2005)).

whether a party has acquired property as a bona fide purchaser in good faith.<sup>64</sup>

The court discussed the Indiana recording statute, which requires a mortgagor in interest in land to be recorded.<sup>65</sup> It also explained how the concept of “chain of title” to property functions in Indiana and what happens in a title search.<sup>66</sup> The court then discussed the presumption under Indiana law that a purchaser of real estate is presumed to have reviewed the records of deeds and other documents that are part of the chain of title in the Recorder’s Office in the county where the real estate is located, and, as a result, a purchaser is charged with notice of all facts recited in the records.<sup>67</sup> Finally, the court mentioned the general rule that when multiple parties claim adverse interests in the same land, the date of recording these interests provides the mechanism in which to determine priority.<sup>68</sup>

The court sorted through all the transactions in the chains of title for the property and concluded that the central issue was whether Adams Trust had actual knowledge in October 1998 of the prior unrecorded deed given to FHCS.<sup>69</sup> The court held that there was a question of fact concerning the trustee’s knowledge and whether the Adams Trust was a bona fide purchaser.<sup>70</sup> For those reasons, the court reversed the grant of summary judgment in favor of Chase and remanded the case to the trial court to address these issues.<sup>71</sup>

The much simpler case of *Kumar v. Bay Bridge, LLC*<sup>72</sup> dealt with a purchaser of property at a tax sale who failed to record the tax deed. Defendant, Atul Kumar, purchased property in Cedar Lake, Indiana at a tax sale but did not record his deed.<sup>73</sup> After the tax deed was issued, the bank that owned the property conveyed it to Bay Bridge, LLC via a trustee’s deed.<sup>74</sup> Bay Bridge filed a quiet title action in January 2007, after discovering that Kumar claimed an interest in the real estate.<sup>75</sup> Kumar recorded his tax deed on February 6, 2007.<sup>76</sup> Both parties filed motions for summary judgment.<sup>77</sup> Bay Bridge alleged that Kumar’s tax deed was either void or a bona fide purchaser of the property.<sup>78</sup> Kumar countered that the tax sale provided adequate notice to the bank, as the record

---

64. *Id.*

65. *Id.*; IND. CODE § 32-21-4-1 (2008).

66. *Weathersby*, 906 N.E.2d at 910.

67. *Id.*

68. *Id.*

69. *Id.* at 911.

70. *Id.*

71. *Id.* at 911-12.

72. 903 N.E.2d 114 (Ind. Ct. App. 2009).

73. *Id.* at 114.

74. *Id.* at 115.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*



owner of the real estate, of his purchase of the real estate at the tax sale.<sup>79</sup>

The court held that the deed, which was outside the chain of title until it was recorded, did not provide notice to Bay Bridge, which made Bay Bridge a bona fide purchaser for value.<sup>80</sup> The court also held that constructive notice is only provided when a deed or mortgage is properly acknowledged and placed on the record as required by the Indiana recording statute.<sup>81</sup>

## II. RESTRICTIVE COVENANTS

The tension between obtaining a variance from local zoning ordinances and enforcing restrictive covenants in a development often plays out before boards of zoning appeals, as well as in trial courts in Indiana. The case of *Highland Springs South Homeowners Ass'n v. Reinstatler*<sup>82</sup> provides a good summary of how conflicts between zoning ordinances and restrictive covenants are resolved. The Highland Springs South Homeowners Association (HOA) brought an action against Vanessa Reinstatler to obtain an injunction to prevent her from building an addition that would violate the restrictive covenants of the subdivision.<sup>83</sup> Property in the Highland Springs South subdivision is subject to restrictive covenants requiring a property owner to submit plans to the HOA for review before construction to make certain that the plans do not violate the restrictive covenants of the subdivision.<sup>84</sup> Another covenant requires that the design or color scheme is in harmony with the general surroundings of the subdivision, and that proposed improvements are not contrary "to the interests, welfare, or rights" of the other homeowners.<sup>85</sup>

Reinstatler requested approval from the HOA for a first floor room addition to her home.<sup>86</sup> The HOA denied the request saying that the addition would violate the set back guidelines for the subdivision, would not be in harmony with the general surroundings of the lot, and would be contrary to the interests, welfare, and rights of the other owners.<sup>87</sup>

The day before the HOA took action, Reinstatler filed a petition with the McCordsville Division of the Hancock County Area Board of Zoning Appeals (BZA) seeking approval of a variance of the set back standards of the zoning ordinance to permit the construction of the addition.<sup>88</sup> The BZA granted the variance with the conditions that the addition comply with the plans submitted with the petition and that the color of the addition match the home to the

---

79. *Id.*

80. *Id.* at 117.

81. *Id.*

82. 907 N.E.2d 1067 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 560 (Ind. 2009).

83. *Id.* at 1069.

84. *Id.* at 1069-70.

85. *Id.* at 1070.

86. *Id.*

87. *Id.*

88. *Id.*

satisfaction of the Hancock County Planning Director.<sup>89</sup> The BZA also gave Reinstatler its approval to obtain building permits.<sup>90</sup>

Shortly thereafter, the HOA sought injunctive relief to prevent Reinstatler from constructing the proposed room addition because it violated set back requirements of the covenants of the subdivision.<sup>91</sup> The trial court upheld the BZA's decision, and the HOA appealed.<sup>92</sup>

As part of its analysis, the Indiana Court of Appeals explained that a restrictive covenant is governed by contract law and is an express contract between the grantor and grantee restraining the grantee's use of the land.<sup>93</sup> Further, in Indiana, restrictive covenants have a strong presumption of validity because a property owner purchases property knowing and accepting the restrictions of the covenants.<sup>94</sup> There is also a long-established Indiana rule that zoning ordinances and statutes cannot be used to remove valid restrictive covenants from real estate.<sup>95</sup> The court held that although Reinstatler received a variance from the BZA, *implementation* of that variance may not violate the restrictive covenants on the property.<sup>96</sup> The court held that "[t]he BZA decision is not relevant and does not deprive the trial court of jurisdiction in this action to enforce the restrictive covenants."<sup>97</sup>

In *Applegate v. Colucci*,<sup>98</sup> the Indiana Court of Appeals addressed a question of first impression as part of a controversy about enforcing a subdivision's covenants—whether cabin rentals constituted a residential use according to a restrictive covenant.<sup>99</sup> Neighbors in a subdivision along the Ohio River sought to enforce restrictive covenants against Colucci, a property owner who began renting cabins after constructing a home and a cabin on each of three lots owned by him.<sup>100</sup> Colucci formed Colucci Cabin Rentals, LLC (collectively, "Colucci") to rent the cabins and used half of a garage on one of the lots with a cabin and a residence for a real estate office.<sup>101</sup> The neighbors filed a complaint alleging that renting the cabins was not a "residential use," that using part of the garage as a

---

89. *Id.*

90. *Id.*

91. *Id.* at 1070-71.

92. *Id.* at 1071.

93. *Id.* at 1073 (citing *Villas W. II of Willow Ridge Homeowner's Ass'n v. McGlothin*, 885 N.E.2d 1274, 1278 (Ind. 2008), *cert. denied*, 129 S. Ct. 1527 (2009)). For a discussion of *Villas West II*, see Marci A. Reddick & Danielle B. Tucker, *Property Law: Recent Developments in Indiana Real Property Law*, 42 IND. L. REV. 1187, 1192-96 (2009).

94. *Highland Springs*, 907 N.E.2d at 1073 (citing *Villas West II*, 885 N.E.2d at 1278-79).

95. *Id.* (quoting *Suess v. Vogelgesang*, 281 N.E.2d 536, 541 (Ind. App. 1972)).

96. *Id.*

97. *Id.*

98. 908 N.E.2d 1214 (Ind. Ct. App. 2009), *trans. denied*, 2010 Ind. LEXIS 7 (Ind. Jan. 7, 2010).

99. *Id.* at 1219.

100. *Id.* at 1216-17.

101. *Id.* at 1217.



real estate office was not a residential use, and that constructing multiple dwellings on the same lot violated the covenant prohibiting subdividing lots.<sup>102</sup> The trial court issued a partial summary judgment in favor of the neighbors on the issue of multiple dwellings on the same lot and partial summary judgment in favor of Colucci on the rental issues.<sup>103</sup>

The Indiana Court of Appeals tackled the residential use covenant first and observed that the precise issue appeared to be an issue of first impression, but also noted that in *Stewart v. Jackson*,<sup>104</sup> the court faced the issue of whether an unlicensed daycare operated out of a home violated restrictive covenants in that neighborhood.<sup>105</sup> In *Stewart*, the homeowner cared for six children, including her child and her nephew.<sup>106</sup> The *Stewart* court found that the daycare was minimally obtrusive and, relying on Indiana's public policy favoring home daycare as well as the plain and ordinary meaning of the term "residential purpose," concluded that the unlicensed home daycare was a residential use not violating restrictive covenants.<sup>107</sup> More recently, in *Lewis-Levett v. Day*,<sup>108</sup> a case reported in last year's survey article,<sup>109</sup> the Indiana Court of Appeals examined whether a larger, state licensed daycare operation was residential or whether it violated the restrictive covenants in the neighborhood. In *Lewis-Levett*, the homeowner cared for twelve children and sixty percent of her home was used for the daycare business.<sup>110</sup> The court drew a distinction between licensed and unlicensed daycare facilities and concluded that where a daycare facility is the extensively regulated type, it is a business enterprise, not a residential use.<sup>111</sup>

The *Applegate* court then contrasted these cases against whether Colucci's short-term rental of cabins constituted a residential use. The covenants imposed on Colucci's property stated, "[n]othing herein contained shall prevent the *leasing or renting* of property or structures for residential use."<sup>112</sup> The court analyzed the plain meanings of the term "residential use" and held that even though the renters only used the cabins on a temporary basis, the use was residential and therefore not at odds with the covenants.<sup>113</sup> The court then held that there was a question of fact whether maintaining a real estate office in the neighborhood violated the covenants and returned this portion of the case to the trial court for an evidentiary hearing.<sup>114</sup> Finally, as to the issue of the subdivision of Colucci's lots, the court

---

102. *Id.* at 1217-18.

103. *Id.* at 1218.

104. 635 N.E.2d 186 (Ind. Ct. App. 1994).

105. *Applegate*, 908 N.E.2d at 1219.

106. *Stewart*, 635 N.E.2d at 192.

107. *Id.* at 193.

108. 875 N.E.2d 293 (Ind. Ct. App. 2007).

109. Reddick & Tucker, *supra* note 93, at 1196.

110. *Lewis-Levett*, 875 N.E.2d at 294.

111. *Id.* at 297-98.

112. *Applegate*, 908 N.E.2d at 1220.

113. *Id.*

114. *Id.* at 1221.

concluded that, although more than one structure had been built upon a lot, it did not constitute subdividing the lot and there were no restrictions in the covenants prohibiting it.<sup>115</sup>

### III. LAND USE

A case reported in the 2009 survey period surfaced again as a vested rights case in the Indiana Court of Appeals this term, *City of New Haven v. Flying J, Inc.*<sup>116</sup> The prior case, “Flying J I,”<sup>117</sup> concerned an appeal of the Board of Zoning Appeals’ (BZA) decision rejecting Flying J’s plan to build a travel plaza.<sup>118</sup> The zoning director of the City of New Haven determined that certain activities proposed at the travel plaza were not permitted in a district zoned C-1 including tractor-trailer truck fueling stations, services for recreational vehicles, RV waste tank disposal facilities, and parking for up to eleven RVs and 187 trucks at a time.<sup>119</sup> Flying J appealed the zoning director’s determination to the New Haven BZA.<sup>120</sup> The BZA found that the fueling stations were permitted in a C-1 district but agreed with the zoning director that the other uses were prohibited.<sup>121</sup> Flying J then filed a petition for writ of certiorari with the trial court, which upheld the BZA’s decision.<sup>122</sup> In the appeal of *Flying J I*, the Indiana Court of Appeals held that the uses were permitted in a C-1 district and remanded the case to the trial court with instructions to enter summary judgment in favor of Flying J.<sup>123</sup>

During the appeal process, the City of New Haven amended its zoning ordinance restricting the size of service stations permitted in a C-1 district, and, as a result of these changes, Flying J’s travel plaza would no longer comply with the ordinance.<sup>124</sup> The city notified the public of the proposed amendment to the ordinance by publication, but Flying J was not aware of the change and submitted a development plan to the zoning director, which was again rejected.<sup>125</sup> Flying J appealed the zoning director’s decision to the BZA and presented evidence that it had spent more than \$4 million in developing the proposed travel plaza.<sup>126</sup> The BZA rejected Flying J’s vested rights argument; however, on appeal the trial court reversed the BZA’s decision and directed approval of Flying J’s

---

115. *Id.* at 1221-22.

116. 912 N.E.2d 420 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 560 (Ind. 2009).

117. *Flying J, Inc. v. City of New Haven, Bd. of Zoning Appeals*, 855 N.E.2d 1035 (Ind. Ct. App. 2006).

118. *Flying J II*, 912 N.E.2d at 421.

119. *Id.* at 421-22.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 423.

126. *Id.*



development plan.<sup>127</sup> This ruling resulted in an appeal by the BZA, “Flying J II.”<sup>128</sup>

The Indiana Court of Appeals examined whether the amended zoning ordinance applied to Flying J’s planned travel plaza.<sup>129</sup> The court acknowledged that zoning ordinances are subject to vested property rights and that a “nonconforming use” cannot be terminated because of a subsequent amendment to a zoning ordinance.<sup>130</sup> The court explained that if a landowner’s use of the property begins before that use is non-conforming, the landowner has acquired a vested property right; therefore, a legislative body may not terminate that right without triggering a due process or Takings Clause claim under the Fifth Amendment of the U.S. Constitution (applicable to Indiana through the Fourteenth Amendment’s Due Process Clause).<sup>131</sup>

The BZA argued on appeal that despite Flying J’s significant expenditures, it had not commenced construction of the travel plaza, and, as a result, it did not have a vested right before amendment of the zoning ordinance.<sup>132</sup> In order to determine whether Flying J could establish a vested property right before commencing construction, the court of appeals considered precedent handed down in a noteworthy line of cases<sup>133</sup>—*Pinnacle I*,<sup>134</sup> *II*,<sup>135</sup> and *III*.<sup>136</sup> In *Pinnacle I*, the Indiana Supreme Court held that simply filing an application for a building permit is not sufficient to establish a vested property right.<sup>137</sup> After granting a rehearing, the Indiana Supreme Court, in *Pinnacle II*, clarified that vested rights could accrue before construction.<sup>138</sup> On remand to the Indiana Court of Appeals in *Pinnacle III*, the court of appeals followed the Indiana Supreme Court’s lead by holding that “[t]here is no bright line rule that construction must have commenced in order to show a vested right.”<sup>139</sup> After considering this line of cases, the court of appeals in *Flying J II* held that the trial court correctly ruled that the zoning ordinance amendments were subject to Flying J’s vested rights in the property to develop it as a travel plaza.<sup>140</sup>

---

127. *Id.*

128. *Id.*

129. *Id.* at 424.

130. *Id.*

131. *Id.* (quoting *Metro Dev. Comm’n of Marion County v. Pinnacle Media, LLC (Pinnacle I)*, 836 N.E.2d 422, 424 (Ind.), *reh’g granted, opinion clarified*, 846 N.E.2d 654 (Ind. 2006)).

132. *Id.* at 425.

133. *Id.* at 424-27.

134. *Id.* at 422.

135. *Metro. Dev. Comm’n of Marion County v. Pinnacle Media, LLC (Pinnacle II)*, 846 N.E.2d 654 (Ind. 2006).

136. *Metro. Dev. Comm’n of Marion County v. Pinnacle Media, LLC (Pinnacle III)*, 868 N.E.2d 894 (Ind. Ct. App. 2007).

137. 836 N.E.2d at 429.

138. 846 N.E.2d at 655.

139. 868 N.E.2d at 900.

140. *City of New Haven v. Flying J, Inc.*, 912 N.E.2d 420, 427 (Ind. Ct. App. 2009).

Indiana courts are frequently asked to determine who may protest the decision of a land-use body. In *Liberty Landowners Ass'n v. Porter County Commissioners*,<sup>141</sup> the Indiana Court of Appeals followed precedent by holding that a homeowner's association did not have standing to sue over the rezoning of property despite arguing that its claim survived under a "public standing doctrine."<sup>142</sup> Northwest Indiana Health System (NIHS) filed an application with the Porter County Plan Commission requesting an amendment to the zoning map so that land could be converted from residential zoning to an institutional category permitting it to construct a hospital.<sup>143</sup> Liberty Landowners remonstrated against the petition at the county commissioners' hearing arguing that rezoning the property to an institutional district would be inconsistent with the adjacent use provisions of the Porter County Unified Development Ordinances.<sup>144</sup> Despite Liberty Landowners' remonstrance, the commissioners approved the rezoning.<sup>145</sup> Following the commissioners' decision, Liberty Landowners' filed a complaint for declaratory judgment against the commissioners seeking a determination that the rezoning action was arbitrary and capricious because (1) the commissioners did not consider the incompatibility of an institutional zone adjacent to R-1 zones; and (2) the vote of one commissioner was invalid due to a conflict of interest.<sup>146</sup> NIHS intervened in the proceedings joining the commissioners in a motion to dismiss Liberty Landowners' complaint for lack of standing, because NIHS and the commission argued that Liberty Landowners did not own real estate in proximity to the rezoned property.<sup>147</sup> The trial court agreed with NIHS and the commissioners concluding that Liberty Landowners did not have standing because it did not own any real estate and it had not offered evidence that it had suffered a pecuniary loss as the result of the re-zoning.<sup>148</sup>

On appeal, Liberty Landowners made an unsuccessful attempt at arguing that a doctrine known as "public standing" permitted it to proceed with its claims against the commissioners.<sup>149</sup> The Indiana Court of Appeals rejected this argument noting that Indiana law is well settled that to challenge a rezoning ordinance, one must have "a property right or some other personal right and a pecuniary injury not common to the community as a whole."<sup>150</sup> The court explained that a person must be "aggrieved" by BZA's decision to have standing to seek judicial review was well established in *Bagnall v. Town of Beverly*

---

141. 913 N.E.2d 1245 (Ind. Ct. App. 2009).

142. *Id.* at 1250-51.

143. *Id.* at 1248.

144. *Id.*

145. *Id.*

146. *Id.* at 1248-49.

147. *Id.* at 1249.

148. *Id.*

149. *Id.* at 1250.

150. *Id.*



*Shores*.<sup>151</sup> The court also observed that it has “consistently held that landowner associations lack standing to challenge zoning decisions.”<sup>152</sup> Furthermore, “[the Indiana] Supreme Court recently determined that a landowner whose property line was less than a mile from a proposed confined animal feeding operation was not an ‘aggrieved party’ within the meaning of *Bagnall*.”<sup>153</sup> The court ruled that Liberty Landowners did not raise the argument of public standing before the trial court and, as a result, it was waived on appeal.<sup>154</sup> Regardless of the waiver, the court also observed that “the public standing doctrine or the availability of taxpayer or citizen standing is limited to extreme circumstances and should be applied with ‘cautious restraint.’”<sup>155</sup>

Confined animal feeding operations (CAFO) are frequently in the news and just as frequently the subject of hotly contested proceedings before local land use boards. In *Thomas v. Blackford County Area Board of Zoning Appeals*,<sup>156</sup> the Indiana Supreme Court addressed the issue of standing in the appeal of the approval of a CAFO by the Blackford County Area Board of Zoning Appeals (BZA).<sup>157</sup> Thomas appealed the BZA’s decision approving a special exception for the CAFO alleging that she was an “aggrieved party” because her property line was approximately a third of a mile from the proposed CAFO.<sup>158</sup>

The trial court rejected Thomas’ claim in a summary judgment proceeding and the Indiana Court of Appeals reversed and remanded the case to permit the parties to fully present evidence; however, in the interim, a petition to transfer was granted by the Indiana Supreme Court before the evidentiary hearing could take place.<sup>159</sup> The court held that the case is governed by the rule in *Bagnall v. Town of Beverly Shores*,<sup>160</sup> which held that a person seeking judicial review of a BZA’s decision must be “aggrieved” in that the petitioner,

must experience a substantial grievance, a denial of some personal or property right or the imposition of a burden or obligation. The board of zoning appeals’s decision must infringe upon a legal right of the petitioner that will be enlarged or diminished by the result of the appeal and the petitioner’s resulting injury must be pecuniary in nature. A party seeking to petition for certiorari on behalf of a community must show some special injury other than that sustained by the community as a

---

151. 726 N.E.2d 782 (Ind. 2000).

152. *Liberty Landowners*, 913 N.E.2d at 1250.

153. *Id.* at 1251 (citing *Thomas v. Blackford County Area Bd. of Zoning Appeals*, 907 N.E.2d 988, 991 (Ind. 2009)).

154. *Id.*

155. *Id.* (quoting *State ex rel. Cittadine v. Ind. Dep’t of Transp.*, 790 N.E.2d 978, 983 (Ind. 2003)).

156. 907 N.E.2d 988 (Ind. 2009).

157. *Id.* at 990.

158. *Id.*

159. *Id.*

160. *Id.* at 991 (citing *Bagnall v. Town of Beverly Shores*, 726 N.E.2d 782 (Ind. 2000)).

whole.<sup>161</sup>

Thomas argued that she was an aggrieved party because the CAFO would significantly affect the value of her home.<sup>162</sup> Thomas and Oolman presented evidence concerning the impact of CAFOs on residential property values, including expert testimony that Thomas's property value would decrease by seventy percent.<sup>163</sup> However, on cross-examination, Oolman demonstrated that the experts relied on articles from 1999 and 2001 that used data from other states permitting more intense operations involving swine, not cows.<sup>164</sup> Oolman refuted Thomas's property value argument with expert testimony that real estate within two miles of four dairy CAFOs in Huntington County sold quicker and at a higher price than other real estate in the county.<sup>165</sup> The court affirmed the trial court's ruling that Thomas could not establish she was an "aggrieved party" to have standing to appeal the BZA decision.<sup>166</sup>

In *Bonewitz v. Parker*,<sup>167</sup> the Indiana Court of Appeals held that even if a use is approved as the result of a variance, it still may constitute a nuisance.<sup>168</sup> Parker owned farmland and sold a portion of it with the farmhouse to Bonewitz.<sup>169</sup> Parker later obtained a variance to produce dry mycelium, which is used for animal feed.<sup>170</sup> Parker built a furnace using sawdust as fuel to dry the mycelium to produce "food-grade" mycelium.<sup>171</sup> The business ran twenty-four hours a day, seven days a week.<sup>172</sup> Bonewitz complained of emissions from the drying process, which included gases and sawdust ash discharged from a smokestack about 100 to 150 feet from Bonewitz's home.<sup>173</sup> In addition, three to five semi-tractor trailers delivered wet mycelium to the Parker facility each day.<sup>174</sup> Product was stored outside and emitted a strong odor.<sup>175</sup> Bonewitz filed a complaint alleging that Parker's business constituted a nuisance and sought a total permanent injunction or, in the alternative, damages.<sup>176</sup> The trial court entered a partial permanent injunction enjoining Parker from unloading sawdust outside

---

161. *Id.* (quoting *Bagnall*, 726 N.E.2d at 786).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. 912 N.E.2d 378 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 558 (Ind. 2009).

168. *Id.* at 382.

169. *Id.* at 379.

170. *Id.*

171. *Id.*

172. *Id.* at 380.

173. *Id.* at 379.

174. *Id.* at 380.

175. *Id.*

176. *Id.*



a pole building that contained the sawdust and did not award damages.<sup>177</sup>

The Indiana Court of Appeals observed that operating a business according to local ordinances and regulations does not necessarily mean that such use of property is reasonable.<sup>178</sup> Whether a nuisance exists depends upon the effect of the use on the neighbors in the particular circumstances and locality; it does not solely rest upon whether one operates the business within the confines of particular authority or a permit.<sup>179</sup> The court found that the evidence clearly demonstrated that Bonewitz suffered unreasonable infringements on the use and enjoyment of his home because of Parker's business.<sup>180</sup> The court concluded that Parker conducted a commercial business that is not typical of farming operations, defeating Parker's arguments that it was within the permitted use.<sup>181</sup> The court remanded the case to the trial court to determine whether Bonewitz could be made whole with a money judgment, noting that an injunction is only available if a remedy at law is inadequate.<sup>182</sup>

The Seventh Circuit Court of Appeals took up two Indiana cases concerning adult bookstores during the survey period. In *Annex Books, Inc. v. City of Indianapolis*,<sup>183</sup> the Seventh Circuit Court of Appeals ordered the U.S. District Court for the Southern District of Indiana to hold an evidentiary hearing on whether the restricted hours in the recently revised adult business ordinance of the City of Indianapolis violated Annex Books' constitutional rights.<sup>184</sup> The City of Indianapolis amended its adult business ordinance in 2003 expanding the definition of "adult entertainment business" to include a retail business where twenty-five percent or more of its space or inventory is for adult literature, films, or devices or a business with twenty-five percent or more of its revenue derived from adult-themed items.<sup>185</sup> Before the amendment, the definition was broader and the requirement was fifty percent.<sup>186</sup> The amended ordinance also required adult entertainment businesses to be licensed, well lit, sanitary, and closed on Sundays or between midnight and ten a.m. on other days of the week.<sup>187</sup>

The only issue brought before the Seventh Circuit was whether the definition of "adult entertainment business," and its corresponding limits on the hours of operations that other general book stores and video outlets do not have, violates the owner's constitutional rights.<sup>188</sup> Chief Judge Easterbrook wrote that the city incorrectly assumed that any empirical study of morality offenses near an adult

---

177. *Id.*

178. *Id.* at 382.

179. *Id.* at 384.

180. *Id.*

181. *Id.*

182. *Id.* at 384-85.

183. 581 F.3d 460 (7th Cir. 2009).

184. *Id.* at 466-67.

185. *Id.* at 461.

186. *Id.*

187. *Id.*

188. *Id.*

business in any city justifies a wide range of legal restrictions.<sup>189</sup> Easterbrook held that the city must demonstrate some basis upon which to regulate adult businesses that effectively suppresses the adverse secondary effects of adult businesses (crime and disorderly conduct) without running afoul of the constitutional right to free speech.<sup>190</sup> He pointed out that the rational-relation test does not apply to the analysis requiring the city to provide evidence supporting the benefits of the restrictions in the ordinance.<sup>191</sup>

The Seventh Circuit decided *New Albany DVD, LLC v. City of New Albany*<sup>192</sup> a week after *Annex Books*. *New Albany DVD* concerned a section 1983 challenge to a city ordinance prohibiting operation of a sexually oriented business within 1,000 feet of a church or residential district.<sup>193</sup> Chief Judge Easterbrook ordered an injunction to remain in place pending the outcome of an evidentiary hearing consistent with its decision in *Annex Books* to determine whether sufficient evidence existed to justify the New Albany ordinance.<sup>194</sup>

Determining whether a practical difficulty exists in order to grant a variance of development standards can be a challenging question for boards of zoning appeals. In *Town of Munster Board of Zoning Appeals v. Abrinko*,<sup>195</sup> the property owner received a variance of development standards from the Munster Board of Zoning Appeals (BZA) to permit the construction of a single-family dwelling contrary to the local setback requirements.<sup>196</sup> The city filed a petition for writ of certiorari to appeal the BZA's decision, and the trial court reversed citing that there was no practical difficulty in developing the property based on the standards found in Indiana Code section 36-7-4-918.5.<sup>197</sup>

The lot was described as a "reverse pie shape" and the property owner wanted to reduce the rear yard setback from twenty-five percent, which was required by the city ordinance, to twenty percent.<sup>198</sup> Neighbors remonstrated at the BZA hearing that the house was too large for the lot and that the value of homes in the area would be reduced if the variance was granted.<sup>199</sup> The BZA approved the variance petition; but in the writ case, the trial court held that the BZA's finding of practical difficulty was not supported by substantial evidence and denied the variance.<sup>200</sup> Explaining its decision, the court held that drawings alone were not adequate to support the practical difficulty finding, even if the

---

189. *Id.* at 463.

190. *Id.*

191. *Id.*

192. 581 F.3d 556 (7th Cir. 2009).

193. *Id.* at 556-57.

194. *Id.* at 561.

195. 905 N.E.2d 488 (Ind. Ct. App. 2009).

196. *Id.* at 490-91.

197. *Id.* at 491.

198. *Id.*

199. *Id.*

200. *Id.*



BZA ignored the option of reducing the size of the house to fit the lot.<sup>201</sup> The court pointed out that the BZA never considered other options for the landowner to comply with the local ordinance.<sup>202</sup> As a result, it held that the BZA's "finding of a practical hardship [did] not rest upon a rational basis, since the evidence supporting [the] finding [was] so meager."<sup>203</sup>

The Indiana Court of Appeals agreed with the trial court that the BZA's record lacked significant evidence of probative value to demonstrate practical difficulties, as required under the statute.<sup>204</sup> The court observed that the standard of practical difficulty has generally required an area variance, which it defined as one that does not affect the use of the land, is less drastic in effect, and does not pose a threat of an incompatible use in the neighborhood.<sup>205</sup> The court also noted to determine the existence of a practical difficulty, a BZA may also examine whether the harm "is self-created or self-imposed," as well as whether any feasible alternative is available within the terms of the ordinance that will achieve the goals of the property owner.<sup>206</sup> Abrinko testified that the house could fit on the lot if it were reduced by three to four hundred square feet.<sup>207</sup> The builder's testimony inferred that a smaller house meant less profit and perhaps that was how the BZA concluded that the smaller house would cause significant economic injury.<sup>208</sup> The court held that the record did not contain evidence establishing either economic impact if the home was built according to the standards of the ordinance or that the pie shape of the lot created a practical difficulty preventing the property owner from constructing a home.<sup>209</sup>

#### IV. PRIORITY OF REAL PROPERTY LIENS

In the challenging economic climate during the survey period, many mortgages continue to be foreclosed upon with attendant disputes concerning the rights of secured parties and the priority of various liens on properties. The Indiana Court of Appeals had an opportunity to examine the question of merger as it relates to strict foreclosure of a mortgage lien in the case of *Deutsche Bank National Trust Co. v. Mark Dill Plumbing Co.*<sup>210</sup> The bank foreclosed the mortgage it held on the debt of Mark Dill Plumbing Company and requested that the trial court extinguish the junior liens.<sup>211</sup> The trial court denied the bank's

---

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 492.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 493.

209. *Id.*

210. 908 N.E.2d 1273 (Ind. Ct. App. 2009).

211. *Id.* at 1274.

request, and its decision was affirmed on appeal.<sup>212</sup> The bank petitioned for rehearing to clarify the court's prior ruling and requested that the court instruct the trial court about the order of priority for payment among the junior lienholders.<sup>213</sup> It also sought an instruction from the court to inform the trial court that it could order junior lien holders to redeem the property from the bank instead of ordering a second sheriff's sale of the property.<sup>214</sup> The Indiana Land Title Association was permitted to file an amicus brief supporting the bank's position.<sup>215</sup>

The court reviewed the merger doctrine and noted that, unless a written instrument provides otherwise, when a mortgagee acquires fee simple title to mortgaged property, the mortgage merges with the title to the property and thereby extinguishes the mortgage lien.<sup>216</sup> The court explained, however, that if the writing is ambiguous, courts will presume that merger was not intended if it will benefit the mortgagee.<sup>217</sup> The "anti-merger rule" allows the mortgagee to prohibit junior lien holders from moving up in priority and foreclosing on the property, thereby further reducing the mortgagee's recovery because it preserves the right of the mortgagee to be the sole lienholder to re-foreclose or resell the property.<sup>218</sup> The anti-merger rule also guarantees the mortgagee's priority in any proceeds.<sup>219</sup> The court held that merger did not occur because it would violate principles of equity or harm the bank's interest.<sup>220</sup> As a result, the priority of the junior lienholders was unchanged, and the court refused to determine the priority of the junior lienholders.<sup>221</sup> The court decided to let the trial court determine "whether to order another sheriff's sale or provide another remedy equitable to the parties" including giving the junior lienholders an opportunity to purchase the property from the bank for the full amount under the mortgage,<sup>222</sup> consistent with the rule set forth in *Hosford v. Johnson*.<sup>223</sup>

In *Lincoln Bank v. Conwell Construction*,<sup>224</sup> the Nichols Group obtained a development loan from Lincoln Bank for a residential subdivision in Johnson County.<sup>225</sup> Nichols hired Conwell Construction to develop the land and provide

---

212. *Deutsche Bank Nat'l Trust Co. v. Mark Dill Plumbing Co.*, 903 N.E.2d 166, 171 (Ind. Ct. App. 2009).

213. *Deutsche Bank*, 908 N.E.2d at 1274.

214. *Id.*

215. *Id.* at 1274 n.1.

216. *Id.* at 1274.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 1275.

221. *Id.*

222. *Id.*

223. 74 Ind. 479 (1881).

224. 911 N.E.2d 45 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 557 (Ind. 2009).

225. *Id.* at 46.



construction plans.<sup>226</sup> Conwell hired three subcontractors to assist it with the work, Hedger Construction, Mitchell Construction, and Grady Brothers.<sup>227</sup> Lincoln Bank recorded its mortgage in 2006.<sup>228</sup> After a dispute arose during the development of the subdivision, the four construction companies each filed mechanic's liens on the property in 2007.<sup>229</sup> Conwell, Hedger, and Mitchell sued Nichols Group for non-payment and to foreclose on their mechanic's liens.<sup>230</sup> They also named the bank and Grady as defendants. Nichols Group counterclaimed.<sup>231</sup> Grady filed claims against the other five parties.<sup>232</sup> Lincoln Bank filed claims against the other five parties as well as the guarantors of the mortgage.<sup>233</sup> The trial court entered judgment for Conwell, Hedger, and Mitchell and ordered the Johnson County Sheriff to sell the real estate and to determine and distribute Conwell, Hedger, and Mitchell's shares of the proceeds.<sup>234</sup> Lincoln Bank appealed asserting that its mortgage had priority over the four mechanic's liens.<sup>235</sup>

The Indiana Court of Appeals noted that, according to the Indiana mechanic's lien statute,<sup>236</sup> a recorded mortgage has priority over a subsequently recorded mechanic's lien "to the extent of the funds actually owed to the lender for the specific project to which the lien rights relate."<sup>237</sup> The court observed that none of the parties disputed that the bank's mortgage was recorded before the four mechanic's liens were recorded, and they did not dispute that the mortgage was for the specific project subject to the lien.<sup>238</sup> The mechanic's lien statute contains a significant group of exceptions for mechanic's lien projects over which a mortgage lien will not have priority: houses, improvements auxiliary to houses, and property controlled by a utility.<sup>239</sup> The court observed that even though the mortgage secured a loan for a residential subdivision, no homes had been constructed and until construction began, there was no certainty that the land would be used to construct single-family dwellings. Therefore, the mechanic's lien exception regarding homes did not apply.<sup>240</sup> Based upon these reasons and the facts, the court held "that the trial court erred in ordering the five

---

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 46-47.

235. *Id.* at 47.

236. IND. CODE § 32-28-3-5(d) (2008).

237. *Lincoln Bank*, 911 N.E.2d at 47 (quoting IND. CODE § 32-28-3-5(d)).

238. *Id.* at 47-48.

239. *Id.* at 48.

240. *Id.* at 49.

creditors to share equally in the foreclosure proceeds.”<sup>241</sup> The court held that the mortgage had first priority based on its recording date and that the four mechanic’s liens had equal priority thereafter.<sup>242</sup>

#### V. LANDLORD/TENANT RELATIONS

Self-help by landlords presents a dilemma that many attorneys deal with during their career of advising landlords and tenants. The case of *Romanowski v. Giordano Management Group, LLC*<sup>243</sup> is a good illustration of the problems that arise when a landlord locks out a tenant from residential property without a court order.<sup>244</sup>

Giordano Management entered into a one-year lease with Ryan Romanowski for a home in Noblesville.<sup>245</sup> Ryan’s father, James, lived in Texas and co-signed the lease for Ryan.<sup>246</sup> About eight months into the lease, Giordano Management learned of problems with Ryan’s tenancy of the home.<sup>247</sup> James Giordano, the owner of Giordano Management (collectively “Giordano”), called the Noblesville Police Department to have the house inspected.<sup>248</sup> Giordano contacted James to inform him about the condition of the house and discussed terminating the lease early.<sup>249</sup> James and Giordano agreed to terminate the lease, but the Romanowskis were required to fulfill various conditions, including cleaning up the home.<sup>250</sup> James sent a letter to Giordano stating that they would move forward with termination of the lease and that they needed until August 6, 2007, to vacate the house.<sup>251</sup> James cleaned the inside of the house and otherwise met the conditions required by Giordano.<sup>252</sup> Ryan went to the house on August 1, 2007, to remove the remainder of his personal property but discovered Giordano locked him out.<sup>253</sup> James made several requests, written and verbal, to Giordano requesting access to the house so that Ryan could obtain his property.<sup>254</sup> Giordano filed a small claims eviction complaint against the Romanowskis on August 3, 2007, and sought damages for breach of the lease.<sup>255</sup> Giordano removed Ryan’s personal property from the house and put it in storage

---

241. *Id.* at 50.

242. *Id.*

243. 896 N.E.2d 558 (Ind. Ct. App. 2008).

244. *Id.* at 559-60.

245. *Id.* at 559.

246. *Id.* at 559-60.

247. *Id.* at 560.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*



on August 14, 2007.<sup>256</sup> The property was damaged when it was returned to Ryan two months later.<sup>257</sup>

The Romanowskis filed a counterclaim and a third-party complaint against Giordano alleging that they had unlawfully locked Ryan out of the house and unlawfully exerted unauthorized control over Ryan's personal property.<sup>258</sup> After the trial in small claims court ruled in favor of Giordano, the Romanowskis appealed.<sup>259</sup>

The Romanowskis alleged that Giordano violated Indiana Code section 32-31-5-6, which prohibits changing the locks on a residence without a court order.<sup>260</sup> The Romanowskis also appealed the possession of Ryan's property, noting that Indiana Code section 32-31-5-5 provides that a landlord may not take possession of a dwelling or remove the tenant's property in order to enforce an obligation of the tenant to the landlord under a lease agreement.<sup>261</sup> Giordano argued that this statute did not apply because Ryan abandoned the home and the exemption under Indiana Code section 32-31-5-6(a) applied.<sup>262</sup> To support its position, Giordano relied on the definition of abandoned rental property in Indiana Code section 32-31-5-6(b)(2): "such that a reasonable person would conclude that the tenants have surrendered possession of the dwelling unit."<sup>263</sup>

The Indiana Court of Appeals reviewed the evidence and concluded that the trial court erred in finding that Ryan abandoned the house.<sup>264</sup> The court held that parties had agreed to the move-out date of August 6, 2007, and the action by the landlord before that date was contrary to that agreement.<sup>265</sup> The court held that the landlord wrongfully evicted the Romanowskis by changing the locks and preventing Ryan from removing his personal property.<sup>266</sup> The court added that the Romanowskis could pursue recovery in a replevin action against the landlord for wrongful detention of their property, noting that once wrongful detention is established, at least nominal damages may be awarded.<sup>267</sup> The court remanded the case to the small claims court for determination of the amount of Ryan's damages for loss of use of his property.<sup>268</sup> The court rejected the Romanowskis's claim that Ryan's property was wrongfully removed from the house based on Giordano's testimony that he thought he had the Romanowskis's consent to

---

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* at 561.

261. *Id.* at 562.

262. *Id.* at 561.

263. *Id.* (citing IND. CODE § 32-31-5-6(b)(2) (2008)).

264. *Id.*

265. *Id.* at 561-62.

266. *Id.* at 562.

267. *Id.*

268. *Id.*

remove the property from conversations with counsel.<sup>269</sup> Yet, the Romanowskis prevailed on their third party claim alleging “that Giordano was liable for civil conversion for exerting unauthorized control over Ryan’s personal property.”<sup>270</sup> The court noted that a civil action under the criminal conversion statute is permitted by Indiana Code section 34-24-3-1, which also allows the victim to recover three times the amount of actual damages in addition to costs of the action and attorney’s fees.<sup>271</sup> Because the court found that Giordano unlawfully denied the Romanowskis access to Ryan’s personal property, it remanded the case to the trial court to determine the amount of Ryan’s damages.<sup>272</sup>

The next case in this summary addresses modification of a lease using electronic communication. *Indiana Bureau of Motor Vehicles v. Ash, Inc.*<sup>273</sup> concerned two leases between Ash and the Indiana Bureau of Motor Vehicles (BMV), as tenant, in the communities of Rockport and Mount Vernon, Indiana.<sup>274</sup> The principal issue in the case was whether a facsimile transmission modifying the terms of the lease constituted a contract.<sup>275</sup> The BMV argued that the fax did not comply with the Indiana statute of frauds, Indiana Code section 32-21-1-1, because it was not “in writing,” it had not been “signed” by the BMV, and the time for performance would exceed a year.<sup>276</sup> The Indiana Court of Appeals disagreed with the BMV’s analysis finding that the fax was a writing (or a contract), was signed by a representative of the BMV, and the work would be completed within a year.<sup>277</sup> As a result, the statute of frauds did not apply.<sup>278</sup>

In a case with a great deal of legal maneuverings and complicated cross-claims, *T-3 Martinsville, LLC v. U.S. Holdings, LLC*,<sup>279</sup> the Indiana Court of Appeals addressed the concepts of waiver and estoppel as well as whether it was appropriate to award pre-judgment interest in an action where a landlord and sublandlord claimed that a tenant and subtenant of a skilled nursing facility failed to pay rent.<sup>280</sup> The court analyzed the default provisions of the lease, which provided:

10.1.1 The failure to pay within five (5) business days of the date when due any Rent, taxes or assessments, utilities, premiums for insurance or other charges or payments required of Tenant under this Lease;

---

269. *Id.*

270. *Id.* at 563.

271. *Id.*

272. *Id.*

273. 895 N.E.2d 359 (Ind. Ct. App. 2008).

274. *Id.* at 362.

275. *Id.* at 365.

276. *Id.* at 367.

277. *Id.*

278. *Id.*

279. 911 N.E.2d 100 (Ind. Ct. App. 2009).

280. *Id.* at 103-04.



...

10.1.9 The failure to perform or comply with any other term or provision of the Lease not requiring the payment of money . . . provided, however, the default described in this Section 10.1.9 is curable and shall be deemed cured, if: (a) within ten (10) business days of Tenant's receipt of a notice of default from Landlord. . . .<sup>281</sup>

Overturning the findings of the trial court, the court held that an event of default for failure to make a payment of money required by the lease did not require notice from the landlord or an opportunity to cure the default.<sup>282</sup> The court also rejected the argument that the common law of Indiana required notice and an opportunity to cure for non-payment of rent.<sup>283</sup> The court concluded that the common law would not produce a different result.<sup>284</sup>

The landlords asserted that the tenants had waived their rights concerning notice. The court disagreed with this theory reasoning that it was more appropriate to apply the standards of estoppel to the parties' course of conduct.<sup>285</sup> The court explained that waiver "is an intentional relinquishment of a known right involving both knowledge of the existence of the right and the intention to relinquish it."<sup>286</sup> Estoppel, on the other hand, is based on the premise that a person who by deed or conduct has induced another to act in a particular manner may not then be permitted to adopt an inconsistent position, attitude, or course of conduct that causes injury to such other.<sup>287</sup> The court held that the landlords had acquiesced to late payments of rent by the tenants for a year and a half, and, as a result, they were estopped from claiming that the tenants breached the lease by failing to timely make rent payments.<sup>288</sup>

## VI. MISCELLANEOUS

A tragic case of the death of a young boy while trying to cross a street on his bicycle in *Jackson v. Scheible*<sup>289</sup> raised an issue of first impression before the Indiana Supreme Court—whether the seller under an installment land contract was liable for the condition of the property where a tree obstructed the boy's view of the street.<sup>290</sup> In its analysis of the case, the court first noted that one who possesses property is defined as "a person who is in occupation of the land with

---

281. *Id.* at 105.

282. *Id.* at 111.

283. *Id.* at 113.

284. *Id.* at 113-14.

285. *Id.* at 116.

286. *Id.* (quoting *van de Leuv v. Methodist Hosp. of Ind., Inc.*, 642 N.E.2d 531, 533 (Ind. Ct. App. 1994)).

287. *Id.* (quoting *Brown v. Branch*, 758 N.E.2d 48, 51-52 (Ind. 2001)).

288. *Id.* at 116-17.

289. 902 N.E.2d 807 (Ind. 2009).

290. *Id.* at 809-10.

intent to control it" in premises liability cases in Indiana where a party has actual control over the condition causing the injury.<sup>291</sup> The court added that a vendor in a land-sale contract typically has no liability for the condition of the property under the theory expressed above, because the vendor no longer occupies or controls the condition of the property, even if the vendor retains legal title as security until the contract is paid.<sup>292</sup>

Scheible, the buyer of the property, argued that Jackson, the seller, should have been held liable for the condition of the property because he continued to act like a landlord after the land contract was executed because he maintained insurance on the property and the buyer had to ask for permission prior to making improvements on the property.<sup>293</sup> The court rejected this argument stating that there was no evidence that Jackson exercised control over the property.<sup>294</sup> The court held that these provisions in the land-sale contract reflected Jackson's desire to protect the property, which served as security for the land-sale contract, not as evidence of control.<sup>295</sup>

Scheible also argued that because Jackson drove past the property several times each month, he was aware of the problem and should have fixed it.<sup>296</sup> Finally, Scheible argued that Jackson's receipt of a notice from the city concerning tree saplings on the property was evidence of Jackson's control of the property even though after Jackson received the notice, he gave it to his purchaser who agreed to address the problem.<sup>297</sup> The court held that Jackson surrendered control of the property to the purchaser and, as a matter of law, any liability rested in the purchaser as the one who possessed and controlled the land.<sup>298</sup>

The final argument offered by Scheible was that violating a city ordinance concerning trimming trees to certain specifications constituted negligence per se on the part of the property owner.<sup>299</sup> The court rejected this argument holding that it did not believe that the ordinance applied to Jackson.<sup>300</sup> The court explained that it is well established under Indiana law that "[w]hen the parties enter into the [land-sale] contract, all incidents of ownership accrue to the vendee."<sup>301</sup> The court stated that at the time of the accident, Jackson, as the vendor under the land-sale contract, was in the position of being a lien holder, not the owner of the property.<sup>302</sup>

---

291. *Id.* at 810 (quoting RESTATEMENT (SECOND) OF TORTS § 328E(a) (1965)).

292. *Id.*

293. *Id.* at 810-11.

294. *Id.* at 811.

295. *Id.*

296. *Id.*

297. *Id.* at 812.

298. *Id.*

299. *Id.*

300. *Id.* at 813.

301. *Id.* (quoting *Skendzel v. Marshall*, 301 N.E.2d 641, 646 (Ind. 1973)).

302. *Id.*



In *Rockford Mutual Insurance Co. v. Pirtle*,<sup>303</sup> the Indiana Court of Appeals had an opportunity to consider, as a matter of first impression, whether an owner's failure to repair or replace a building was excused, permitting the owner to recover replacement costs under a fire insurance policy.<sup>304</sup> The court also examined other issues relating to consequential damages sought by the property owner.<sup>305</sup> Pirtle purchased a historic building in Terre Haute, Indiana, obtained a mortgage, and insured the building through a policy with Rockford Mutual Insurance Company.<sup>306</sup> The mortgage was for \$140,250.<sup>307</sup> Pirtle rented the property while it was being restored.<sup>308</sup> In early 1999, the historic building was valued at \$165,000; however, it was damaged in an accidental fire on November 11, 2000.<sup>309</sup> Rockford's independent adjuster estimated the damage to be worth \$79,907.49.<sup>310</sup> Rockford gave its adjuster the authority to settle the claim for \$80,000.<sup>311</sup> Pirtle rejected this settlement stating that it was not enough to satisfy the mortgage or to repair the building.<sup>312</sup> In addition, because of the damage to the building, it could no longer be leased to Pirtle's tenants.<sup>313</sup>

Pirtle hired a contractor in 2001 who estimated the damage at \$232,915.39.<sup>314</sup> Rockford's claims supervisor reviewed the claim and obtained authority to settle the claim for the policy limit of \$193,000.<sup>315</sup> However, Pirtle's attorney only received an offer of \$69,874.62 from Rockford's adjuster because he considered that amount to be the actual case value of the building.<sup>316</sup> Rockford's adjuster held firm, arguing that this value was calculated using an estimate for the repairs, less depreciation of the property.<sup>317</sup> Pirtle's attorney made a demand for the policy limits under Pirtle's coverage, minus a ten percent discount, but Rockford's adjuster maintained that he was only permitted to offer the actual cash value of the building.<sup>318</sup> Another independent adjuster completed an analysis of the building and determined that it was worth \$86,146.66.<sup>319</sup>

Pirtle retained another attorney and filed suit against Rockford alleging

---

303. 911 N.E.2d 60 (Ind. Ct. App. 2009).

304. *Id.* at 62.

305. *Id.*

306. *Id.* at 62-63.

307. *Id.*

308. *Id.* at 63.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

breach of contract and bad faith.<sup>320</sup> The court dismissed the bad faith claim with prejudice when Rockford paid \$86,146.66, the building's actual cash value, to Pirtle.<sup>321</sup> Rockford filed a motion for summary judgment stating that the court should deny Pirtle's claim because it had paid the actual cash value of the building to Pirtle.<sup>322</sup> The court denied summary judgment. At trial, the jury found that Rockford breached the insurance contract and awarded \$124,149.55 to Pirtle under the policy plus consequential damages of \$406,136.58.<sup>323</sup> Rockford appealed the decision.<sup>324</sup>

Pirtle's policy with Rockford provided for replacement coverage without deduction for depreciation; however, Rockford claimed that Pirtle had received all that he was entitled to receive because he did not comply with the terms of the contract requiring Pirtle to repair the building.<sup>325</sup> On the other hand, Rockford had not obtained a certified real estate appraisal to determine the actual cash value of Pirtle's property as required by the contract.<sup>326</sup>

The Indiana Court of Appeals concluded that Pirtle had no choice but to use the actual cash value he received from Rockford to satisfy his mortgage, leaving him nothing for repairs.<sup>327</sup> The court noted that a cash value policy is a pure indemnity policy, while replacement cost coverage is optional and purchased at an additional cost.<sup>328</sup> Applying equitable principles, the court held that not to enforce the repair or replacement endorsement paid for by Pirtle would have rendered the contract illusory.<sup>329</sup> Because Rockford failed to advance funds for repair or replacement of the building according to the endorsement Pirtle purchased, the court excused Pirtle's failure to rebuild the building as a condition precedent for recovery under a fire insurance policy.<sup>330</sup> The court also rejected Rockford's claim that its liability should be capped at the policy limits stating that a party injured as the result of the other party's breach may recover consequential damages caused by the breach.<sup>331</sup>

A dispute over a real estate commission led to an appeal in *Niezer v. Todd Realty, Inc.*<sup>332</sup> Niezer entered into a listing agreement with Todd Realty to sell property he owned on Lake Wawasee in northern Indiana.<sup>333</sup> Todd found a buyer for the property; however, Niezer refused to sign a counteroffer and tried to play

---

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.* at 64.

324. *Id.*

325. *Id.*

326. *Id.* at 65.

327. *Id.*

328. *Id.*

329. *Id.* at 66.

330. *Id.* at 67.

331. *Id.* at 67-68.

332. 913 N.E.2d 211 (Ind. Ct. App. 2009).

333. *Id.* at 213.



this offer off against a second offer with a higher purchase price.<sup>334</sup> The court determined that Todd Realty's obligation under the listing contract was merely to secure a buyer who was flexible on the date of possession and willing to negotiate in good faith with Niezer arriving at a mutually acceptable date of possession.<sup>335</sup> The court pointed out that Niezer was not willing to perform his part of that process in which he was also required to act in good faith to transfer the property on a possession date established by negotiation.<sup>336</sup> The court concluded that Niezer's action to play one offer against the other to obtain a higher purchase price and effectively to shut Todd Realty out of a commission was contrary to the terms of the agreement.<sup>337</sup> The court concluded that Niezer's acts constituted "contractual sabotage or other acts in bad faith" ultimately causing Todd Realty's inability to perform, and that Niezer could not be permitted to prevail.<sup>338</sup> As a result, Niezer was required to pay the brokerage commission to Todd Realty.<sup>339</sup>

The actions of a homeowners' association to collect delinquent assessments brought the Fair Debt Collection Practices Act (FDCPA), as well as an analysis of the liability standards under the Indiana Nonprofit Corporation Act of 1991 ("Nonprofit Act"), before the Indiana Court of Appeals. In *Baird v. ASA Collections*,<sup>340</sup> Baird appealed the trial court's judgment in favor of a collection agency who sought to obtain delinquent dues and assessments from her on lots that she had purchased at a tax sale.<sup>341</sup> First finding that Baird waived her claim concerning the application of the Nonprofit Act, the court held that debt collection by ASA was not subject to the FDCPA because Baird did not intend to use the lots for "personal, family, or household purposes" as required by the FDCPA.<sup>342</sup>

The companion case to *Baird*, *Van Prooyen Builders, Inc. v. Lambert (Van Prooyen I)*,<sup>343</sup> concerned the proration of real property taxes associated with the sale of real estate. In *Van Prooyen I*, VanProoyen Builders, Inc. appealed from the trial court's judgment in favor of Earl and Mildred Lambert for real property taxes owed under their real estate purchase agreement.<sup>344</sup> The dispute focused on whether, given the late assessments of real property in Lake County, Indiana,

---

334. *Id.* at 213-14.

335. *Id.* at 216.

336. *Id.*

337. *Id.* at 217.

338. *Id.* at 218 (quoting *Ind. State Highway Comm'n v. Curtis*, 704 N.E.2d 1015, 1019 (Ind. 1998)).

339. *Id.*

340. 910 N.E.2d 780 (Ind. Ct. App. 2009).

341. *Id.* at 781-82.

342. *Id.* at 786 (quoting Fair Debt Collection Practices Act, 15 U.S.C. § 1692a(5) (2006)).

343. 907 N.E.2d 1032 (Ind. Ct. App.), *aff'd on reh'g*, 911 N.E.2d 619 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 558 (Ind. 2009).

344. *Id.* at 1033.

their agreement required proration of 2006 taxes payable in 2007.<sup>345</sup> The trial court concluded that tax bills had not been delivered on time in Lake County since 2002 and held that language in the real estate contract providing “that all real estate taxes ‘assessed against the subject property after closing shall be paid by the Buyer’ is void as against public policy.”<sup>346</sup> The Indiana Court of Appeals concurred with this ruling, holding that the purchase agreement unambiguously provided for prorating property taxes and that the statutory assessment date of March 1 controls the tax provision in the contract, which is consistent with the parties’ clear intent to prorate the tax liability.<sup>347</sup> The builder therefore was required to pay the Lamberts’s portion of the 2006 property taxes payable in 2007 and attributable to the period when the builder owned the property.<sup>348</sup>

Van Prooyen petitioned the Indiana Court of Appeals for rehearing in *Van Prooyen II*,<sup>349</sup> complaining of several errors in the *Van Prooyen I* opinion.<sup>350</sup> The court granted rehearing for the limited purpose of addressing Van Prooyen’s argument that the only issue addressed by the trial court and raised by the parties on appeal was whether the tax proration provision in the purchase agreement violated public policy.<sup>351</sup> The court held that Van Prooyen had failed to meet its burden of successfully proving that public policy in Indiana favored its position and further concluded that in a contract dispute its first task is to review the terms and conditions of the actual contract.<sup>352</sup> The court held “that the contract unambiguously prorated the tax liability.”<sup>353</sup> As a result, affirming the trial court’s ruling based on this legal theory made the discussion of whether the contract violated public policy was irrelevant.<sup>354</sup> The court rejected Van Prooyen’s argument that its only duty was to address the legal theory relied upon at the trial court and held that its review was not limited to the public policy issue solely because Van Prooyen did not address the tax provisions in the contract issue in its briefs.<sup>355</sup> The court pointed out that a dispute over the meaning of the tax provision is what gave rise to the cause of action.<sup>356</sup> As a result, the tax provision was appropriately before the court, and the court was well within its power to make its decision based on the plain language of the contract.<sup>357</sup>

---

345. *Id.*

346. *Id.*

347. *Id.* at 1033-34.

348. *Id.* at 1038.

349. 911 N.E.2d 619 (Ind. Ct. App. 2009).

350. *Id.* at 619-20.

351. *Id.*

352. *Id.* at 620.

353. *Id.*

354. *Id.*

355. *Id.* at 620-21.

356. *Id.* at 621.

357. *Id.*



## VII. NEW STATUTES EFFECTIVE JULY 1, 2009

*A. Homeowners' Associations*

Indiana Code section 32-25.5-2 establishes new governance and budgetary requirements for homeowners associations.<sup>358</sup> After major changes in 2007, the legislature amended the homeowner's association lien statute in 2009 to permit foreclosure on a lien within one year after the property owner or lienholder receives notice of the lien, instead of thirty days.<sup>359</sup>

*B. Common Law Liens*

The holder of a common law lien must foreclose within 180 days after the lien is recorded or it will be extinguished.<sup>360</sup> The lien now must be filed no later than sixty days after the date of the last service provided by the person asserting the lien.<sup>361</sup>

*C. Residential Mortgage Foreclosure*

The legislature added a new chapter to the Indiana mortgage statutes, in response to legislative concern about the high rate of residential mortgage foreclosures in Indiana, to improve communication between lenders and homeowners.<sup>362</sup> The statute creates detailed notice requirements for creditors filing foreclosure actions.<sup>363</sup> It also requires settlement conferences and mediation or alternative dispute resolution before the court entering a foreclosure judgment with the goal of the parties entering into a foreclosure prevention agreement.<sup>364</sup>

*D. Disclosure of Flood Plain*

The location of the lowest floor of a structure, including a basement, in a 100-year flood plain must now be disclosed by property owners in written rental agreements and in renewals of written rental agreements for residential, agricultural, and commercial properties.<sup>365</sup>

*E. Liens on Special Tools*

A new chapter was added to the Indiana lien statutes permitting the end users of "special tools" to file a lien for amounts due from customers for metal

---

358. IND. CODE §§ 32-25.5-3-1 to -7 (2009).

359. *Id.* § 32-28-14-9.

360. *Id.* § 32-28-13-4(c).

361. *Id.* § 32-28-13-5(a).

362. *Id.* §§ 32-30-10.5-1 to -11.

363. *Id.* § 32-30-10.5-8.

364. *Id.* § 32-30-10.5-9.

365. *Id.* § 32-31-1-21.

fabrication work or work improving a special tool.<sup>366</sup> The statute defines "special tools" as "tools, dies, jigs, gauges, gauging fixtures, special machinery, cutting tools, injection molds, or metal castings."<sup>367</sup> This statute supplements the current lien statute for fabricators of dies, molds, forms, and patterns.<sup>368</sup>

---

366. *Id.* § 32-33-20-6.

367. *Id.* § 32-33-20-3.

368. *Id.* §§ 32-33-16-0.5 to -9.



# THE STAGNATION OF INDIANA REAL PROPERTY LAW

APRIL SPARKS PYATT\*  
TANYA D. MARSH\*\*

Each year in this issue, an attempt is made to summarize the noteworthy developments affecting real property law in the state of Indiana. It touches on subjects including real estate transactions, landlord/tenant law, liens and mortgages, land use, statutory law, and the common law of property, including concepts like adverse possession and servitudes. At the end of this article, we will summarize some notable cases that became a part of the law between October 1, 2008, and September 30, 2009.<sup>1</sup> First, however, we will more broadly address the state of Indiana real property law in the year 2010.

## I. THE STATE OF INDIANA REAL PROPERTY LAW

In the Anglo/American legal system, scholars have described land as the “darling” of the law.<sup>2</sup> Indiana is no exception. Although private “property rights are not absolute,”<sup>3</sup> Indiana law consistently holds that real property is special. Judges have described land as “more than [a] physical object”<sup>4</sup> and includes among the rights associated with it, the right “to acquire, possess, use and dispose of it without control or diminution save by the law of land.”<sup>5</sup> Each parcel of land is unique.<sup>6</sup> A landowner “may use his own land as he pleases,” subject to the rights of his neighbors and the community.<sup>7</sup>

Given the stated importance of real property in the Anglo/American legal system, it would follow that the law of real property would be vibrant and reflect the changes in an evolving economy. But in Indiana, that is not the case in either statutory or common law.

### A. Statutory Law

Statutory property law in Indiana has changed little in the past three decades, and large sections of it have been in place since the 1850s. Since the foundation of the state, the Indiana General Assembly has taken a conservative approach to property law, largely relying on the common law except in administrative matters

---

\* Partner, Ice Miller LLP, Indianapolis, Indiana. J.D., 1998, Ohio Northern University College of Law.

\*\* Assistant Professor, Wake Forest Law School. J.D., 2000, Harvard Law School.

1. A thorough survey of Indiana case and statutory law during the survey period is available at Marcia A. Reddick, *Recent Developments in Indiana Real Property and Related Areas of Law*, 43 IND. L. REV. 937 (2010).

2. Nancy Perkins Spyke, *What's Land Got to Do With It?: Rhetoric and Indeterminacy in Land's Favored Legal Status*, 52 BUFF. L. REV. 387, 420 (2004).

3. Bd. of Zoning Appeals v. Leisz, 702 N.E.2d 1026, 1032 (Ind. 1998).

4. Dep't of Fin. Insts. v. Holt, 108 N.E.2d 629, 634 (Ind. 1952).

5. *Id.*

6. Tri-Profl Realty, Inc. v. Hillenburg, 669 N.E.2d 1064, 1069 (Ind. Ct. App. 1996).

7. Trs. of Wabash & Erie Canal v. Spears, 16 Ind. 441, 442 (1861).

that require a statutory structure.

The Indiana Code addresses real property in titles 32 and 36. "Property" is the name of title 32 and it is logically the primary source for statutory real property law in Indiana.<sup>8</sup> In addition, two sections of title 36, entitled "Local Government," concern real property topics. Chapter 36-2-11 addresses the office of the County Recorder and includes statutes relevant to "instruments that are proper for the recording."<sup>9</sup> Finally, article 36-7 of the Indiana Code addresses government regulation of real property, including topics such as planning and zoning,<sup>10</sup> historic preservation,<sup>11</sup> building commissions, and redevelopment of blighted areas.<sup>12</sup>

Although the legislature has modernized the language of title 32 on several occasions, much of title 32 has remained substantively static since the 1850s.<sup>13</sup> For example, Indiana Code section 32-21-1-13 states that:

Except for a bona fide lease for a term not exceeding three (3) years, a conveyance of land or of any interest in land shall be made by a deed that is:

- (1) written; and
- (2) subscribed, sealed, and acknowledged by the grantor (as defined in IC 32-17-1-1) or by the grantor's attorney.<sup>14</sup>

Prior to the 2002 recodification, this concept was found in section 32-1-2-4, which read: "Conveyances of lands, or of any interest therein, shall be by deed in writing, subscribed, sealed, and duly acknowledged by the grantor, or by his attorney; except bona fide leases for a term not exceeding three (3) years."<sup>15</sup> The legislature originally introduced that section to the Indiana Code in 1852, it and remained unchanged until the recodification 150 years later. A related statute, section 32-21-4-1, states that all conveyances of land, mortgages, and leases for more than three years "must be recorded in the recorder's office of the county where the land is situated."<sup>16</sup> That statute was also introduced to the Indiana Code in 1852 in substantively the same form, although it was tweaked in 1875,

---

8. In its 2002 regular session, the Indiana General Assembly recodified title 32 of the Indiana Code (the "Code") through Senate Enrolled Act 57 (the "Act"). The 450-page Act made tens of thousands of changes to the Code, the vast majority of which were technical. The purpose of the Act, by its very terms, was to "recodify prior property law in a style that is clear, concise, and easy to interpret and apply." IND. CODE § 32-16-1-2 (2008).

9. IND. CODE § 36-2-11-8 (2007).

10. IND. CODE § 36-7-4 (2007 & Supp. 2009).

11. IND. CODE § 36-7-11 (2007).

12. IND. CODE § 36-7-14 (2008).

13. The legislature recodified Title 32 in 2002, but the recodification explicitly intended to have no substantive impact on the "operation and effect of the prior property law." IND. CODE § 32-16-1-2 (2008).

14. *Id.* § 32-21-1-13.

15. IND. CODE § 32-1-2-4 (2001) (current version at IND. CODE § 32-21-1-13 (2008)).

16. IND. CODE § 32-21-4-1 (2008).



1913, 1921, and 1923.

Together, these two statutes require that all conveyances of land (including leases for more than three years) must be in writing, signed by the grantor, notarized, and recorded. They must also be “subscribed [and] sealed,”<sup>17</sup> although those terms do not appear to be defined in the Indiana Code. Sections 32-31-2-1 and 32-31-2-2, originally added to the code in 1897, establish the consequences for violating these statutes—leases in excess of three years that are not recorded within forty-five days after execution shall be void against future purchasers and mortgagees.<sup>18</sup> These statutes illustrate one of the significant problems that nearly 160-year-old statutes cause—they are ignored. Few leases in Indiana are notarized, let alone “subscribed [and] sealed.”<sup>19</sup> Although certain sophisticated commercial tenants may insist upon recording a memorandum of lease in order to give the world notice of their leasehold interest,<sup>20</sup> they are the minority and the modern practice of real estate law in Indiana does not include the recordation of leases themselves. Indeed, confidentiality provisions in many leases expressly forbid their recordation or disclosure of their terms. Despite the conflict between the statutes and practice, a *détente* has emerged where the two simply ignore one another. Of course, this *détente* is dangerous—a purchaser could easily invoke the statutes to void a below-market lease or rid itself of a troublesome tenant. A court could hardly invalidate the statutes because they have been ignored for nearly 160 years.

The same situation has arisen with respect to the recording statutes. Chapter 36-2-11 of the Indiana Code describes a paper-based indexing system including an entry book,<sup>21</sup> grantor-grantee indexes,<sup>22</sup> and separate indexes for deeds and mortgages.<sup>23</sup> This recording system has its origins in the earliest days of the state. It was part of the Code before the 1851 Constitutional Convention and was again added in 1852.<sup>24</sup> Of course, most Indiana counties have now switched to computerized recording and indexing systems.<sup>25</sup> The Indiana Code makes no explicit mention of these modern systems, neither permitting nor forbidding them. But some of the statutes, with their references to “entry books”<sup>26</sup> and

---

17. *Id.* § 32-21-1-13.

18. *Id.* §§ 32-31-2-1 to -2 (original version at Ind. Acts 1897, ch. 106, § 1).

19. *Id.* § 32-21-1-13.

20. Tenants which may insist upon a memorandum of lease would include ground lease tenants, sale/leaseback tenants or other occupants of single-tenant buildings, retail tenants which occupy an “anchor” position in a shopping center or mall, and office tenants which occupy a significant portion of a building. Indiana Code 36-2-11-20 (2007) permits the recording of a memorandum of lease rather than the lease itself.

21. IND. CODE 36-2-11-9 (2007).

22. *Id.* § 36-2-11-12.

23. *Id.*

24. See, e.g., 1852 Ind. Acts, 1RS, ch. 91, §§ 1-3.

25. See Tanya D. Marsh, *The Limits of Constructive Notice: A Call to Reform Indiana's Recording Statutes*, 46 RES GESTAE 20 (Oct. 2002).

26. See IND. CODE § 36-2-11-9 (2007) (“The recorder shall keep an entry book in which he

“printed forms for record books”<sup>27</sup> simply do not apply to a non-paper-based system. This disconnect between the Code and practice creates an opportunity to argue that an instrument recorded and indexed in a computerized system does not provide good notice because the system does not conform to the statutory requirements.

The legislature added a number of other significant sections of title 32 of the Indiana Code in the 1800s that have remained substantively unchanged, including chapters on partition,<sup>28</sup> easements by prescription,<sup>29</sup> landlord-tenant relations,<sup>30</sup> and mortgages.<sup>31</sup> Of course, the General Assembly added some new substance during the twentieth century, including articles regarding condominiums,<sup>32</sup> liens,<sup>33</sup> and planning and zoning.<sup>34</sup> But many of these changes took place in the 1920s, 1940s, and 1970s. The General Assembly has not made significant changes to the Indiana Code regarding real property since the early 1980s.

The changes implemented by the General Assembly in 2009 are typical of the incremental progress in Indiana statutory real property law. In the most significant change, the legislature added a new chapter to penalize the owners of vacant and abandoned properties.

### *B. Common Law of Property*

When researching property law in Indiana, it is a common occurrence to find that the most recent opinion issued on a particular point dates to the 1980s, or even the 1880s. On many points, the precedent is so old and disconnected to the modern role of real estate in the economy that it is of questionable application.

---

shall enter the date on which he received each instrument for recording, the names of the parties to the instrument, a description of the premises affected by the instrument, and the fees for recording the instrument.”).

27. *See id.* § 36-2-11-11 (“A county recorder may use printed forms for record books only for the recording of instruments presented by persons who presented fifty (50) or more instruments for recording during the preceding year.”).

28. IND. CODE §§ 32-17-4-1 to -24 (2008) (formerly codified in scattered sections of IND. CODE § 32-4 (2001)).

29. *Id.* §§ 32-23-1-1 to -4 (formerly codified as IND. CODE §§ 32-5-1 to -4 (2001)).

30. The legislature added most of the “General Provisions” of the “Landlord-Tenant Relations” article of the Code were added in 1881. *See id.* §§ 32-31-1-1 to -18.

31. The legislature added many fundamental provisions of the “Mortgages” article to the Indiana Code in 1852. *See, e.g., id.* § 32-29-1-2; *id.* § 32-29-1-8.

32. The legislature largely created Indiana Code 32-25, titled “Condominiums,” in 1963, revised in 1977, and recodified in 2002. *See, e.g., id.* § 25-1-1; *id.* § 32-25-4-2.

33. The legislature created the statutes in Indiana Code 32-28, titled “Liens on Real Property,” between 1909 and 1945, revised a few times and recodified in 2002. *See, e.g., id.* § 32-28-1-1; *id.* § 32-28-3-2.

34. The legislature created Indiana Code 36-7, titled “Planning and Development,” in the late 1960s with minor changes in the last twenty years. *See, e.g., IND. CODE* § 36-7-2-2 (2007); *id.* § 36-7-2-3; *id.* § 36-7-9-13.



This problem is particularly acute with respect to commercial real estate, where it is more difficult to make parallels between an opinion from decades or century ago (which likely dealt with farmland or a simple commercial property) and modern real estate, with complex arrangements between adjacent owners, lenders/borrowers, landlord/tenants, and purchasers/sellers.

Commercial real estate leasing is an especially neglected area of the Indiana common law of property. In Indiana, few if any statutes apply to commercial (as opposed to residential) leases. Few appellate cases in modern times shed light on what rules may apply to these landlord/tenant relationships. For example, in 2005, the Indiana Court of Appeals considered a commercial lease that included a clause that provided for a particular tenant remedy but which did not expressly limit the tenant's remedies.<sup>35</sup> The court was forced to reach back to 1911 and 1917 for relevant precedent to address this fairly standard commercial lease provision.<sup>36</sup>

This broad lack of relevant precedent in commercial leasing leads to a litany of unanswered questions. For example, the remedies available at law and equity to a commercial landlord and tenant in the event of breach by the other are fuzzy. Under what circumstances can the landlord evict the tenant? May it do so for a non-material breach? If a departing tenant leaves personal property in the premises, under what circumstances may the landlord take possession of it? If the tenant defaults, may the landlord accelerate all rent due for the remaining term? If so, can it then re-let the premises to another tenant? If a portion of the premises is uninhabitable, can the tenant successfully argue constructive eviction of the entire premises? Can it recover damages, or must it terminate the lease? The number of appellate cases that address these issues is minuscule compared to the number of commercial landlord/tenant disputes that actually occur.

Because of this disconnect between law and reality, commercial leases have become lengthy creatures of contract, designed to resolve as many issues as possible without appealing to the law. This reliance on contract law is expensive because it requires the expertise of attorneys. It can also cause predictable problems when contracts are unclear or fail to address possible outcomes. For example, a landlord enters into a long-term lease with a retail tenant. During the tenancy, tenant decides to cease operations and assign the lease to another retailer. Landlord consents and the three parties enter into a contract that assigns the lease but requires the original tenant to remain financially liable in the event that the assignee defaults in its obligations to landlord. After a period of time, the assignee stops paying rent. Landlord notifies original tenant, who makes

---

35. *Simon Prop. Group, L.P. v. Mich. Sporting Goods Distribs., Inc.*, 837 N.E.2d 1058 (Ind. Ct. App. 2005).

36. *Id.* at 1074 (citing *Strauss v. Yeager*, 93 N.E. 877, 882 (Ind. App. 1911) ("A contract which excludes some remedy given by law should be so definite and positive in its terms as to show the clear intention of the parties to do so."); *Whitcomb v. Indianapolis Traction & Terminal Co.*, 116 N.E. 444, 445 (Ind. App. 1917) ("Therefore, even if a lease provides a specific remedy, a landlord has not been deprived 'of any rights given by law, unless the terms thereof expressly restricted the parties to such specified remedy.'")).

good on the unpaid rent. Assignee eventually stops operating and abandons the premises. Unfortunately, the assignment contract fails to contemplate this turn of events. Who now takes control of the premises? The landlord or the original tenant, who has no reversionary interest under the assignment agreement? Indiana law is silent. If the landlord and the original tenant both take a pragmatic approach and work together, they can figure out an answer, but the law provides none.

Commercial real estate transactions are another weak spot in the Indiana common law of property. For example, what remedies are available to the seller if the purchaser breaches a real estate contract? A purchaser, which has contracted for a unique parcel of land, has a clear right to equitable relief—specific performance of the contract. Even though the doctrine of mutuality of remedies has been discredited,<sup>37</sup> is the converse true as well? Or is the seller limited to money damages because, after all, it only bargained for money, which is hardly unique?

It has been historically true that the remedy of specific performance has been “as freely available to vendors as it is to purchasers.”<sup>38</sup> Although modern treatises and casebooks note that courts grant specific performance to sellers “as a matter of course,”<sup>39</sup> only select jurisdictions, including Indiana, affirmed that concept in modern times. In 2003, the court of appeals reaffirmed the availability of specific performance as a remedy for a non-breaching seller.<sup>40</sup> The court’s reasoning was interesting:

It is a matter of course for the trial court to grant specific performance of a valid contract for the sale of real estate. . . . It is true that the number of cases in Indiana in which a vendor has been awarded specific performance of a contract is rather small. . . . We have found no law which changes this time honored principle. . . . While the reasons for awarding specific performance to vendors may be less compelling than the reasons for awarding specific performance to purchasers following a vendor’s breach, the remedy is available nonetheless.<sup>41</sup>

The court cited only two cases for the principle that a seller has a right to specific performance in Indiana—one from 1999<sup>42</sup> and one from 1906.<sup>43</sup> The

---

37. 25 WILLISTON ON CONTRACTS § 67:40 (4th ed. 2010).

38. *Perron v. Hale*, 701 P.2d 198, 202 (Idaho 1985) (citing *Tombari v. Griep*, 350 P.2d 452, 454-55 (Wash. 1960)).

39. MILTON R. FRIEDMAN, *FRIEDMAN ON CONTRACTS AND CONVEYANCES OF REAL PROPERTY* § 7:1.4 (2009) (“Specific performance is generally given the seller as a matter of course. . . . The right to damages at law nevertheless remains.”).

40. *Humphries v. Ables*, 789 N.E.2d 1025, 1034-35 (Ind. Ct. App. 2003).

41. *Id.* (citations omitted).

42. *Id.* at 1035 (citing *Salin Bank & Trust Co. v. Violet U. Peden Trust*, 715 N.E.2d 1003 (Ind. Ct. App. 1999)).

43. *Id.* (quoting *Migatz v. Stieglitz*, 77 N.E. 400 (Ind. 1906) (holding that a “vendor must likewise be permitted in equity to compel the acceptance of his deed and the payment of the



1999 case is not on point because the purchaser did not contest and so the court did not address the underlying principle.<sup>44</sup> It appears that only two other cases in Indiana legal history address the point—one case in 1982,<sup>45</sup> and one in 1883.<sup>46</sup> Thus, in the past 126 years, an Indiana appellate court has discussed whether equitable remedies are available to the vendors of real estate on only five occasions. In the most recent cases, it appears that the court upheld the doctrine simply because of the earlier precedent even though it found the justifications “less compelling.”<sup>47</sup>

Many other states have been willing to revisit the historical rationales and challenge the time-honored principle. An oft-cited case is the New Jersey appellate opinion in *Centex Homes Corp. v. Boag*.<sup>48</sup> In 1972, Mr. and Mrs. Boag entered into a purchase agreement for a condominium unit under construction in a high-rise development. Soon after, Mr. Boag learned that he was to be transferred to Chicago and informed the seller that he would be unable to complete the transaction. The seller sued for specific performance or, in the alternative, for liquidated damages in the amount of the deposit.<sup>49</sup>

The court briefly discussed the principles behind granting specific performance and noted that

at the time this branch of equity jurisdiction was evolving in England, the presumed uniqueness of land as well as its importance to the social order of that era led to the conclusion that damages at law could never be adequate to compensate for the breach of a contract to transfer an interest in land.<sup>50</sup>

The court questioned the application of this reasoning to the breach of a purchase agreement by the buyer:

While the inadequacy of the damage remedy suffices to explain the origin of the vendee’s right to obtain specific performance in equity, it does not provide a *rationale* for the availability of the remedy at the instance of the vendor of real estate. Except upon a showing of unusual circumstances or a change in the vendor’s position, such as where the vendee has entered into possession, the vendor’s damages are usually measurable, his remedy at law is adequate and there is no jurisdictional

---

stipulated consideration”)).

44. *Salin Bank*, 715 N.E.2d at 1007-08.

45. *Ridenour v. France*, 442 N.E.2d 716 (Ind. Ct. App. 1982) (holding that “the trial court abused its discretion in not granting . . . specific performance” in favor of vendors, even though a fire destroyed the property after the contract consummated but before closing).

46. *Stephenson v. Arnold*, 89 Ind. 426 (1882).

47. *Humphries v. Ables*, 789 N.E.2d 1025, 1035 (Ind. Ct. App. 2003).

48. 320 A.2d 194, 196-97 (N.J. Super. Ct. Ch. Div. 1974).

49. *Id.* at 195.

50. *Id.* at 196.

basis for equitable relief.<sup>51</sup>

\* \* \*

[L]oss of interest is readily measurable and can be recovered in an action at law, and to the extent that the vendor has sustained no economic injury, there is no compelling reason for equity to grant to him the otherwise extraordinary remedy of specific performance.<sup>52</sup>

Stability and predictability in the common law are important principles, but the common law can only remain relevant if the appellate courts are willing to challenge the well-settled rules from time to time and question whether they are still appropriate. The economic role of real property has seen fundamental and epic changes since the 1800s. The law needs to adapt to those shifts.

One reason that the common law of property has failed to develop in Indiana is article 7, section 4 of the Indiana Constitution. In 1970, the legislature amended the provision to provide for direct appeals to the Indiana Supreme Court for all criminal sentences longer than ten years.<sup>53</sup> The change had a disastrous impact on the court's ability to address civil appeals. By 1986, criminal appeals and direct transfers constituted ninety-three percent of the high court's docket.<sup>54</sup> The legislature amended the provision in 1988 to limit direct appeals only for sentences of life imprisonment or for a term of greater than fifty years.<sup>55</sup> The benefits of that change were meaningful but relatively short-lived. By 1999, criminal appeals constituted more than seventy percent of the Indiana Supreme Court's docket.<sup>56</sup> On November 7, 2000, Indiana voters modified the provision once more, limiting the Indiana Supreme Court's direct jurisdiction in criminal appeals to sentences of death.<sup>57</sup> Although the removal of most criminal direct transfers has helped more civil cases reach the state's highest court, the chances for the court to consider a property case are still slim. In 2008, the Indiana Supreme Court issued ninety-six opinions; fifty-two were in civil cases.<sup>58</sup>

Although Indiana seems particularly resistant to change, or has been especially limited in its opportunities to effect change, the problem is not limited to this state. More broadly, the stagnation of the common law of property results from a combination of factors. Transactional attorneys view the litigation process as unworkable, particularly in the real estate context, for three key reasons: (1) the cost; (2) the length of time until resolution; and (3) the uncertain outcome. If neither the common law nor statutory law provide easy answers to

---

51. *Id.*

52. *Id.* at 196-97 n.2.

53. IND. CONST. art. VII, § 4 (as amended 1970).

54. Randall T. Shepard, *Why Changing the Supreme Court's Mandatory Jurisdiction is Critical to Lawyers and Clients*, 33 IND. L. REV. 1101, 1102 (2000).

55. IND. CONST. art. VII, § 4 (as amended 1988).

56. Shepard, *supra* note 54, at 1104.

57. IND. CONST. art. VII, § 4 (as amended 2000).

58. Mark J. Crandley & P. Jason Stephenson, *An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 2008*, 42 IND. L. REV. 773, 775 (2009).



an issue, the parties are likely to conclude that they are better off resolving their differences out of court than spending time and money to achieve an unpredictable result. This situation is a classic Catch-22—the parties to real estate disputes refuse to bring their cases to the appellate courts in part because of the failure of the courts to modernize the Indiana common law of property, but the appellate courts of Indiana have limited opportunities to modernize the law because of the failure of parties to modern disputes to allow their cases to be heard.

## II. LANDLORD/TENANT LAW

### A. *Security Deposit Statute*

During this survey period, the Indiana courts continued to address and resolve certain ambiguities and conflicts arising under Indiana's Security Deposits Statute.<sup>59</sup> In *Klotz v. Hoyt*,<sup>60</sup> the Indiana Supreme Court clarified the meaning of the term “damages” under the Security Deposits Statute and held that a failure by a property owner to timely mail a tenant an itemized list of damages, only precludes a landlord from recovering damages for physical harm to the rented premises and does not bar recovery of unpaid rent and other damages to which the landlord may be entitled.<sup>61</sup>

Klotz rented certain premises to Hoyt and Kornmann (together, “Tenant”) pursuant to a residential lease agreement, which commenced on July 1, 2006, and expired on June 30, 2007.<sup>62</sup> Tenant paid rent through the middle of August, moved out without notifying Klotz, and thereafter stopped paying rent. Klotz notified Tenant in November 2006 of his intention to evict, and after receiving no response, Klotz filed an action in small claims court against Tenant.<sup>63</sup> The trial court evicted Tenant on February 20, 2007 and set a damages hearing for March 16, 2007.<sup>64</sup> Klotz did not mail written notice of damages to Tenant or return a portion of the security deposit to Tenant as required by the Security Deposits Statute. Instead, at the damages hearing, Klotz presented in evidence an exhibit detailing unpaid rent, late fees, damages to the premises, and attorney fees. Following the damages hearing, the trial court entered judgment against Klotz denying Klotz recovery of any damages and ordered Klotz to return all of the security deposit to Tenant.<sup>65</sup> Klotz appealed.

On appeal, Holt argued that the “no damages are due” language set forth in section 15 of the Security Deposits Statute<sup>66</sup> meant that Klotz's failure to provide

---

59. IND. CODE § 32-31-3-1.1-19 (Supp. 2009).

60. 900 N.E.2d 1 (Ind. 2009).

61. *Id.* at 5.

62. *Id.* at 2.

63. *Id.*

64. *Id.*

65. *Id.* at 2-3.

66. IND. CODE § 32-31-3-15 (2008).

Tenant with adequate notice, barred Klotz from recovering any damages resulting from Tenant's breach of the lease, including unpaid rent, and that such failure required "remittance of the full security deposit and reasonable attorney fees" to Tenant.<sup>67</sup> Klotz, relying on section 12(c) of the Security Deposits Statute, which provides: "This section does not preclude the landlord or tenant from recovering other damages to which either is entitled"<sup>68</sup> argued that failure to provide adequate notice did not preclude it from seeking unpaid rent and other damages to which it was entitled under the lease.<sup>69</sup> The court of appeals agreed with Klotz and reversed the trial court's decision. In reversing the trial court, the court of appeals concluded that the Security Deposits Statute in "no way affects or hampers the landlord's ability and right to sue the tenants for the rent that they are contractually obligated to pay."<sup>70</sup> In its decision, the court of appeals noted existing Indiana case law to the contrary and the conflicting sections of the Security Deposits Statute relating to damages.<sup>71</sup>

The Indiana Supreme Court granted transfer to resolve the conflict. Using standard rules of statutory construction, the court found that the Tenant's reading of section 15 would render section 12(c) meaningless, and that a landlord's failure to deliver adequate notice only precludes the landlord from recovering damages for *physical* harm to the rented premises, and does not bar recovery of unpaid rent and other damages.<sup>72</sup>

Although, not determinative of the outcome of the case, the court went on to express its "disapproval of considering a landlord's trial exhibit itemizing damages as equivalent to the statutory notice of damages," required by the Security Deposits Statute.<sup>73</sup> Justice Sullivan issued a dissenting opinion in this case. Based on his statutory analysis, Justice Sullivan interpreted section 12(c) of the Security Deposits Statute to mean that a property owner may recover more than the amount of the security deposit if the evidence supports such determination.<sup>74</sup> But he interpreted section 15 of the Security Deposit Statute to mean that if a property owner failed to comply with the statutory notice requirement, then a property owner would not be entitled to any damages and would be required to return all of the security deposit to its tenant.<sup>75</sup>

Justice Sullivan noted in his dissent that this interpretation of the Security Deposits Statute was supported by the Indiana Supreme Court's decision in *Lae v. Householder*,<sup>76</sup> where the court held that "[f]ailure to refund and supply the itemized list results in a waiver of any claim for damages and exposes the

---

67. *Klotz*, 900 N.E.2d at 5.

68. IND. CODE § 32-31-3-12 (2008).

69. *Klotz*, 900 N.E.2d at 5.

70. *Id.* at 4 (quoting *Klotz v. Hoyt*, 880 N.E.2d 1234, 1236 (Ind. Ct. App. 2008)).

71. *Id.*

72. *Id.* at 5.

73. *Id.* at 6.

74. *Id.* at 7-8 (Sullivan, J., dissenting).

75. *Id.* at 8.

76. 789 N.E.2d 481 (Ind. 2003).



landlord to liability for the tenant's attorney fees."<sup>77</sup>

In *Bergerson v. Bergerson*,<sup>78</sup> the court of appeals addressed whether a property owner provided adequate notice of itemized damages to his residential tenants in accordance with the Security Deposits Statute. The court determined based on its statutory analysis of the Security Deposits Statute and the purpose and intent of the Security Deposits Statute, that written notice delivered to tenants prior to the termination of a residential lease agreement was sufficient for purposes of the Security Deposits Statute.<sup>79</sup>

The court of appeals held in *Bergerson v. Bergerson* that, although it may be unusual for a property owner to provide notice of damages to a tenant before the termination of a residential lease agreement, nothing in section 12 of the Security Deposits Statute states that such notice cannot be given before termination.<sup>80</sup> The court of appeals further held that "[p]roviding notice prior to the termination of the rental agreement does not harm the tenant and serves the statute's purposes of facilitating timely return of the security deposit and providing information to the tenant."<sup>81</sup>

It is interesting to note that the court of appeals in *Bergerson v. Bergerson* also held that certain documentation submitted into evidence by property owner at trial, which itemized how the tenant's security deposit was applied, provided, in part, sufficient notice of damages to the tenant for purposes of the Security Deposits Statute.<sup>82</sup> This appears to be in conflict with the dicta in *Klotz v. Hoyt* where the Indiana Supreme Court indicates that an exhibit itemizing damages submitted at trial would not be adequate for purposes of providing notice to a tenant as required by the Security Deposits Statute.<sup>83</sup>

### *B. Inverse Condemnation: Exhaustion Rule*

In *Jacobsville Developers East, LLC v. Warrick County*,<sup>84</sup> the Indiana Court of Appeals addressed whether a developer's voluntary dismissal of a certiorari action resulted in a failure by the developer to exhaust its available administrative remedies and therefore precluded the developer from filing an inverse condemnation action.<sup>85</sup>

Jacobsville Developers East, LLC (JDE) filed an application seeking approval of a subdivision plat with the Warrick County Area Planning Commission (the "Plan Commission"). The Plan Commission denied JDE's application on the grounds that the proposed plat failed to comply with the

---

77. *Klotz*, 900 N.E.2d at 8 (quoting *Lae*, 789 N.E.2d at 484) (Sullivan, J., dissenting).

78. 895 N.E.2d 705 (Ind. Ct. App. 2008).

79. *Id.* at 712-13.

80. *Id.* at 712-13 & n.6.

81. *Id.* at 713 n.6.

82. *Id.* at 711-12.

83. *Klotz v. Holt*, 900 N.E.2d 1, 6 (Ind. 2009).

84. 905 N.E.2d 1034 (Ind. Ct. App. 2009).

85. *Id.* at 1036-37.

County Subdivision Control Ordinance that required the plat designate a fifty-foot strip as a public right-of-way in accordance with the County's Thoroughfare Plan.<sup>86</sup> JDE filed a certiorari action alleging that the required dedication was not reasonably or rationally related to the impact of the proposed subdivision and that the denial of the proposed plat constituted an unconstitutional exaction without just compensation.<sup>87</sup> Subsequently, JDE dismissed the certiorari action and filed a second application for plat approval, which included the fifty-foot public right-of-way dedication. The Plan Commission approved the second plat filing.<sup>88</sup>

Thereafter, JDE filed an inverse condemnation action alleging that the ordinance's dedication requirement constituted a taking without just compensation.<sup>89</sup> The trial court dismissed JDE's claim for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted.<sup>90</sup> JDE appealed the trial court's decision.

On appeal, JDE argued that it had exhausted the administrative remedies available to it by obtaining a final decision by the Plan Commission and thus, was not required to complete the certiorari review process before initiating the inverse condemnation action.<sup>91</sup> JDE further argued that it was not required to exhaust administrative remedies because the certiorari court could only affirm, modify or reverse the Plan Commission's action and could not provide a compensatory remedy.

In deciding the case, the court of appeals discussed the exhaustion rule and set forth that in Indiana, "the general rule is that a party is not entitled to judicial relief for an alleged or threatened injury until the prescribed administrative remedy has been exhausted."<sup>92</sup> The court of appeals then discussed the futility exception to the exhaustion rule argued by JDE and indicated that in order to satisfy the requirements of the futility exception a party must demonstrate that review would have been "impossible or fruitless or that the agency would have been *powerless* to effect a remedy."<sup>93</sup>

In making its determination, the court of appeals analyzed the remedies that the certiorari court could have affected in connection with JDE's action. Referencing Indiana Code section 36-7-4-1009, the court of appeals noted that a certiorari court does not have the right to impose a compensatory remedy and, therefore, if JDE were seeking monetary compensation at the time JDE filed its

---

86. *Id.* at 1037.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1036.

92. *Id.* at 1038 (quoting *Austin Lakes Joint Venture v. Avon Utils., Inc.*, 648 N.E.2d 641, 644 (Ind. 1995)).

93. *Id.* at 1039 (citing *LHT Capital, LLC v. Ind. Horse Racing Comm'n*, 895 N.E.2d 124, 126 (Ind. Ct. App. 2008)).



certiorari action, the futility exception would apply.<sup>94</sup> Conversely, if JDE was seeking a declaratory judgment to reverse the Plan Commission's decision when it brought its certiorari action, the certiorari court would of had the ability to provide an effective remedy.<sup>95</sup>

Based on its review of the facts of the case, the court of appeals determined that at the time JDE sought certiorari review, it was seeking to reverse the Plan Commission's decision and to avoid the dedication requirement and not to be compensated for an actual taking.<sup>96</sup> Thus, if JDE had pursued its certiorari action, the court could have reversed or modified the Plan Commission's decision and approved the first plat without the right-of-way dedication, thereby obviating the need for JDE to file the inverse condemnation action in the first place. The court of appeals held that by failing to fully pursue the judicial review remedy in the certiorari action, JDE failed to exhaust its available administrative remedies and, as a result, the trial court lacked subject matter jurisdiction.<sup>97</sup>

### *C. Standing: Aggrieved Party Status*

During this survey period, the Indiana courts reviewed several zoning cases to address whether a party had standing<sup>98</sup> as an aggrieved party to challenge a zoning decision. In *Benton County Remonstrators v. Board of Zoning Appeals*,<sup>99</sup> the court of appeals determined whether certain remonstrators had standing to challenge special exceptions granted by the Benton County Board of Zoning Appeals (BZA) permitting the location and operation of two confined animal feeding operations within the jurisdiction. The trial court ruled that the remonstrators did not have standing as aggrieved persons to challenge the BZA's decision.<sup>100</sup>

In its review of the case, the court of appeals stated that under Indiana law in order to have standing to seek judicial review of the BZA decision, the remonstrators must have been "aggrieved" by the decision.<sup>101</sup> Citing the Indiana

---

94. *Id.* (referencing IND. CODE § 36-7-4-1009 (2007) which provides: "The court may determine the sufficiency of the statements of illegality contained in the petition, without further pleadings, and may make its determination and render its judgment with reference to the legality of the decision of the board of zoning appeals, on the facts set out in the return to the writ of certiorari. . . . In passing on the legality of the decision of the board, the court may reverse, affirm, or modify the decision of the board brought up for review.").

95. *Id.*

96. *Id.*

97. *Id.*

98. See *Vectren Energy Marketing & Services v. Executive Risk Specialty Insurance Co.*, 875 N.E.2d 774, 777 (Ind. Ct. App. 2007), where court of appeals sets forth: "[s]tanding is a judicial doctrine that focuses on whether the complaining party is the proper party to invoke the trial court's jurisdiction."

99. 905 N.E.2d 1090 (Ind. Ct. App. 2009).

100. *Id.* at 1093.

101. *Id.* at 1097.

Supreme Court's decision in *Bagnall v. Town of Beverly Shores* and Indiana Code section 36-7-4-1003(a), the court of appeals stated that to be aggrieved, the remonstrators must have experienced a substantial grievance, a denial of some personal or property right, or the imposition of a burden or obligation, and the remonstrators must show some special injury other than that sustained by the community as a whole.<sup>102</sup>

In reaching its opinion in the case, the court of appeals focused on the fact that the group of remonstrators in the case included adjoining landowners.<sup>103</sup> Citing existing case law, the court of appeals held that the adjoining landowners could validly claim to be an aggrieved party because their opinion as to the future devaluation of their property was sufficient to establish special injury and potential pecuniary harm, and therefore the adjoining landowners had standing to file the petition challenging the BZA's decision.<sup>104</sup>

### III. TAKINGS/EMINENT DOMAIN LAW

#### A. *The Indiana Right to Farm Act: Unconstitutional Taking*

In this survey period, the court of appeals reviewed and determined whether the Indiana Right to Farm Act (the "Act"),<sup>105</sup> which was enacted in an attempt to limit the circumstances under which agricultural operations could become subject to nuisance suits, was an unconstitutional taking.<sup>106</sup>

In 1998, Donald J. Lindsey and Jacquelyn Lindsey (together, "Lindsey") built a house on property located in Andrews, Indiana, which was located adjacent to unimproved agricultural property.<sup>107</sup> On June 24, 2002, Degroot Dairy, LLC ("DeGroot") commenced operation of a large dairy on the adjacent agricultural property.<sup>108</sup> On December 9, 2003, Lindsey sued Degroot seeking to enjoin the dairy and for compensation for nuisance, negligence, trespass, criminal mischief, and intentional infliction of emotional distress.<sup>109</sup> Degroot successfully moved for summary judgment. In its summary judgment order, the trial court determined that the Act was constitutional and that it barred Lindsey's

---

102. *Id.* at 1097-98 (citing *Bagnall v. Town of Beverly Shores*, 726 N.E.2d 782, 786 (Ind. 2000) and IND. CODE § 36-7-4-1003(a) (2007 & Supp. 2009) which states: "[e]ach decision of the legislative body under section 918.6 of this chapter or the board of zoning appeals is subject to review by certiorari. Each person aggrieved by a decision of the board of zoning appeals or the legislative body may file with the circuit or superior court of the county in which the premises affected are located, a verified petition setting forth that the decision is illegal in whole or in part and specifying the grounds of the illegality.").

103. *Id.*

104. *Id.* (quoting *State v. Hamer*, 199 N.E. 589, 595 (Ind. 1936)).

105. IND. CODE § 32-30-6-9 (2008).

106. *Lindsey v. DeGroot*, 898 N.E.2d 1251 (Ind. Ct. App. 2009).

107. *Id.* at 1255.

108. *Id.*

109. *Id.* at 1256.



nuisance claims.<sup>110</sup>

In reliance on an Iowa Supreme Court case, Lindsey argued on appeal that the Act amounted to an unconstitutional taking because the Act essentially allowed an easement over Lindsey's property without just compensation.<sup>111</sup> The court of appeals rejected this argument, stating that nothing in Indiana law suggested that the right to maintain a nuisance is an easement and that Lindsey failed to provide any reason for the court to adopt such a rule.<sup>112</sup>

After rejecting Lindsey's argument and determining that the Act was in fact constitutional, the court of appeals reviewed the statutory provisions of the Act and found that because Lindsey had brought the claim later than one year following commencement of operations of the dairy, Lindsey could only prevail by showing either (1) that there had been a significant change in the type of operation, (2) the dairy would have been a nuisance at the time the dairy began in its locality, or (3) the nuisance resulted from the negligent operation of the dairy.<sup>113</sup> The court of appeals went on to determine that Lindsey failed to assert at the trial court level that there had been any significant change in the operation of the dairy or that the dairy would have been a nuisance at the time the operation began at the trial court, and thus waived such claim on appeal.<sup>114</sup>

Turning to whether the nuisance resulted from the negligent operation of the dairy, Lindsey's claim of negligence was based exclusively on Degroot's alleged violations of an Indiana Department of Environmental Management regulation related to manure runoff that may have contaminated a stream one mile downstream from the Lindsey's property.<sup>115</sup> Given that two separate tests of the water supply provided no evidence of contamination; the court of appeals determined that Lindsey failed to show that the violations were the proximate cause of the claimed injury and therefore failed to prove negligence.<sup>116</sup>

### *B. Compensable Damages: Loss of Access*

The Indiana Supreme Court addressed whether losses incurred due to impaired access resulting from a taking were compensable in the case of *State v. Kimco of Evansville, Inc.*<sup>117</sup> Kimco of Evansville, Inc. owned a shopping center in Evansville known as Plaza East. The Plaza's primary access was from two separate points on the Plaza's west side from an adjacent public road called

---

110. *Id.*

111. *Id.* at 1258 (citing *Bormann v. Bd. of Supervisors in and for Kossuth County*, 584 N.W.2d 309, 313 (Iowa 1998)).

112. *Id.* at 1259.

113. *Id.*

114. *Id.* at 1259-60.

115. *Id.*

116. *Id.* at 1260-61.

117. 902 N.E.2d 206 (Ind. 2009), *reh'g denied*, No. 82S01-0806-CV-308, 2009 Ind. LEXIS 625 (Ind. May 13, 2009), *cert. denied*, No. 82S01-0806-CV-308, 2010 U.S. LEXIS 572 (Jan. 19, 2010).

Green River Road (the "Road").<sup>118</sup> The Plaza's southernmost access point from the Road had full access (i.e., left-in, left-out, right-in, right-out), and the northernmost access point had nearly full access (i.e., left-in, right-in, right-out, but no left-out). In 2000, the State of Indiana filed a complaint to acquire a 0.154 acre strip of land along the western border of the Plaza to widen the Road.<sup>119</sup> The State also sought the "permanent extinguishment of all rights and easements of ingress and egress to, from and across" the Road along the length of the acquired property.<sup>120</sup> As a practical matter, this precluded the Plaza from adding new entrances from the Road or widening the existing access points.

In October 2000, the trial court issued an Order of Appropriation permitting the State to go forward with the condemnation.<sup>121</sup> Sometime thereafter, Kimco requested a jury trial on the issue of damages.<sup>122</sup> During the following years, the State modified the Road in such a manner that southbound motorists were unable to use the southern entrance at all due to a new median (i.e. right in, right out only), and northbound motorists could only access the southern entrance by performing a difficult merger with traffic entering onto the Road from an expressway onto a new merger lane. The northern entrance gained a left-out, giving it full access.

At the jury trial for damages, Kimco presented evidence that (1) the median and merger lane restricted access to the southernmost entrance, (2) the impaired access at the southern entrance created unsafe congestion at the northern entrance, (3) the road reconfigurations made the Plaza undesirable to retail tenants, and (4) the Plaza's occupancy had dropped by nearly forty percent due to access issues.<sup>123</sup> The State requested judgment on the evidence at the close of Kimco's case on the basis that impaired access is not compensable, and was denied.<sup>124</sup> At the close of evidence, the State again objected to the "submission of the issue of compensability of access rights to the jury."<sup>125</sup> The trial court denied the objection and instructed the jury that it could award damages if it found that Kimco "suffered a particular, private injury resulting from a substantial and material interference with Kimco's rights of ingress and egress which are special and peculiar to this property and when no other reasonable means of access are available."<sup>126</sup> Thereafter, the jury awarded Kimco \$2.3 million in damages.<sup>127</sup>

The State appealed. On appeal, the State argued that the trial court erred by admitting Kimco's loss of access evidence and giving the jury instruction

---

118. *Id.* at 208.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 208-09.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 210.



referenced above.<sup>128</sup> The court of appeals held that the trial court properly admitted the loss of access evidence, concluding that the sum of the State's roadway improvements "amounted to more than mere inconvenience, and that Kimco suffered a taking of its access rights as a matter of law."<sup>129</sup>

In its discussion of the case and relevant law, the Indiana Supreme Court reaffirmed its view that state and federal takings clauses are textually indistinguishable and are to be analyzed identically.<sup>130</sup> Citing *Lingle v. Chevron*, the supreme court stated that an inverse taking is compensable if it deprives an owner of all or substantially all economic or productive use of his or her property.<sup>131</sup> The supreme court then stated that the factors to be considered in connection with such inverse taking analysis as adopted in *Lingle* included: (1) "the economic impact of the regulation on the property owner," (2) "the extent to which regulation has interfered with distinct investment-backed expectations, and" (3) "the character of the government action."<sup>132</sup> The supreme court briefly reviewed other Indiana case law where the Indiana courts had considered whether takings were "special" or "peculiar" injuries that exceeded mere inconvenience, and then determined that such additional analysis would be subsumed within the *Lingle* test and did not add any value to the case at hand.<sup>133</sup>

The supreme court also reviewed certain statutory rights conferred by the Indiana legislature, and noted that the same only provided for the measure of damages resulting from a taking, and did not create a right to compensation where no taking had occurred.<sup>134</sup>

After the supreme court's discussion of the *Lingle* test, the supreme court determined that "[t]he effects of the road improvements on Plaza East, if viewed separately from the taking of the 0.154-acre strip, plainly do not meet the *Lingle* test."<sup>135</sup> The court proceeded to decide the case based on the supreme court's decision in *State v. Ensley*, where the supreme court held that a median installation that caused a retail facility to lose direct access from an adjacent public street did not entitle defendants to compensation because "acts done in the proper exercise of governmental powers and not directly encroaching on private property, although their consequences may impair its use or value, do not constitute a taking."<sup>136</sup>

The supreme court rejected the distinction made by the court of appeals from the facts of *Ensley*. The court of appeals noted that (1) not only had a median been installed, but that (2) the right-in/right-out drive was not impacted, and (3) merge lane added to the Road created unsafe congestion problems at Kimco's

---

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 211 (citing *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-40 (2005)).

132. *Id.*

133. *Id.* at 211-12.

134. *Id.* at 212 (citing IND. CODE § 32-24-1-9(c) (2004)).

135. *Id.* at 211-12.

136. *Id.* at 212 (quoting *State v. Ensley*, 164 N.E.2d 342, 346 (Ind. 1960)).

north entrance.<sup>137</sup> The supreme court agreed that these facts were present, but noted that Kimco had no property right in the free flow of traffic past its premises. Therefore, further impairment by these additional improvements were of no consequence.<sup>138</sup>

In response to Kimco's argument that the "'permanent extinguishment of all rights and easements of ingress and egress' along the appropriated strip" precluded it from enhancing its points of access, the supreme court stated that "a 'property owner is not entitled to unlimited access to abutting property at all points along the highway.'"<sup>139</sup>

Kimco also argued that under *State v. Peterson*, if there is a change in the highest and best use due to a change in access, the same may be compensable.<sup>140</sup> The supreme court countered that the Plaza remained a shopping center, and therefore no compensable taking resulted from the change in access.<sup>141</sup>

Relying on *Ensley*, the supreme court found that "although an elimination of rights of ingress and egress constitutes a compensable taking, the mere reduction in or redirection of traffic flow to a commercial property is not a compensable taking of a property right."<sup>142</sup> In keeping with this analysis, the supreme court held that losses resulting from impaired access are not compensable and reversed the trial court's decision deeming the \$2.3 million verdict excessive as a matter of law.<sup>143</sup>

#### IV. LIENS AND MORTGAGES

##### A. *Equitable Subrogation*

In *Neu v. Gibson*,<sup>144</sup> the court of appeals analyzed Indiana's equitable subrogation law and addressed the rights and remedies available to an equitable subrogation lien holder in connection with a mortgage foreclosure action. Specifically, the court of appeals addressed whether such a lien holder could recover interest and attorneys' fees and whether such lien holder is entitled to a sheriff's sale of the real estate encumbered by its lien.<sup>145</sup> The appeal addressed in this opinion follows the court's 2007 ruling in the same dispute regarding the priority of the lien rights of each of the parties involved in the case.<sup>146</sup>

In April 2004, Irwin Mortgage Corporation loaned \$506,900 to John Nowak,

---

137. *Id.* at 214.

138. *Id.* at 215.

139. *Id.* at 214-15 (quoting *Ensley*, 164 N.E.2d at 348).

140. *Id.* at 215 (citing *State v. Peterson*, 381 N.E.2d 83 (Ind. 1978)).

141. *Id.*

142. *Id.* at 214.

143. *Id.* at 216.

144. 905 N.E.2d 465 (Ind. Ct. App. 2009), *superseded*, 928 N.E.2d 556 (Ind. 2010).

145. *Id.* at 468.

146. *See Gibson v. Neu*, 867 N.E.2d 188 (Ind. Ct. App. 2007).



which loan was secured by a first mortgage on Nowak's residence.<sup>147</sup> In September 2004, Nowak bought a business from Brett T. Gibson for \$350,000, which was paid via a promissory note from Nowak payable to Gibson and secured by a second mortgage on Nowak's residence.<sup>148</sup> Thereafter, without notifying Gibson, Nowak sold the residence to Thomas and Elizabeth Neu (together, the "Neus").<sup>149</sup> The Neus used their funds and funds borrowed from Washington Mutual Bank to purchase the residence.<sup>150</sup> The funds borrowed from Washington Mutual were secured by a mortgage on the residence. The purchase transaction resulted in the pay off of the Irwin mortgage.<sup>151</sup> The title search performed by the title company handling the closing for the purchase transaction did not disclose Gibson's second mortgage.

In June 2005, Nowak defaulted on the promissory note and second mortgage granted to Gibson.<sup>152</sup> Thereafter, Gibson filed a complaint against Nowak, the Neus, and Washington Mutual for a judgment on the promissory note and to foreclose on the residence. A few months later Nowak filed for bankruptcy.<sup>153</sup> At the time of the bankruptcy filing, both the promissory note and the second mortgage in favor of Gibson remained unpaid. At some point, Wells Fargo took assignment of the Washington Mutual loan. In the 2007 opinion relating to this matter, the court of appeals ruled that Gibson's mortgage was subordinate to the equitable lien of the Neus and Wells Fargo (together, "Appellants").<sup>154</sup>

Following the 2007 appeal, Appellants filed a motion requesting that the trial court "award them interest and attorney's fees in addition to the lien that they had obtained through equitable subrogation and order a sheriff's sale of the real estate to satisfy the liens in their proper order of priority."<sup>155</sup> On November 21, 2007, the trial court entered an order granting judgment to Gibson in the amount of \$380,438.57, foreclosing Gibson's mortgage, reiterating its earlier ruling that the Appellants' lien amount was \$506,016.34, and denying the Appellants' request for a sheriff's sale of the residence.<sup>156</sup> In connection with such denial, the trial court stated that it could not "order a foreclosure sale when there [was] no foreclosure."<sup>157</sup> But the trial court determined that Gibson could request a sheriff's sale of the residence based on his foreclosure judgment.<sup>158</sup>

On appeal, the Appellants contended that they should have the right to foreclose on the equitable subrogation lien that was granted in their favor and the

---

147. *Neu*, 905 N.E.2d at 468.

148. *Id.*

149. *Id.*

150. *Id.* at 469.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 470.

155. *Id.* at 471.

156. *Id.* (quotation omitted).

157. *Id.*

158. *Id.*

right to recover interest and attorneys' fees pursuant to the Irwin mortgage. The Appellants argued that if they were not granted these rights, their lien would be worthless.<sup>159</sup>

The court of appeals rejected the Appellants' argument that it should have the right to foreclose its equitable foreclosure lien. The court of appeals held that Appellants failed to demonstrate that they had "any right to foreclose [on the Irwin mortgage] against Nowak."<sup>160</sup> The court stated that equitable subrogation allows one paying the debt of another to succeed to the priority of the debt paid. But the assumption of the first mortgagee's priority status did not permit Appellants to foreclose under the terms of the Irwin mortgage. The court went on to hold that Nowak satisfied any default under the first mortgage when Nowak repaid the loan in connection with the sale to the Neus.<sup>161</sup> Moreover, the court noted that Wells Fargo made no claim that it was going to foreclose on the Neu's mortgage as the Neus had consistently paid their mortgage indebtedness to Wells Fargo.<sup>162</sup>

The court of appeals also rejected the Appellants' argument that they were entitled to interest payments or attorneys' fees as set forth in the Irwin mortgage. The court of appeals noted that "Wells Fargo, as the new lender, [was] subrogated to the lien of the Irwin Mortgage only as security for Wells Fargo's debt owed by the Neus and not as security for the debt owed by Nowak."<sup>163</sup> The court further noted that Wells Fargo had already received interest payments on the debt from the Neus and "that the Neus had no expectation of receiving interest and attorney's fees when they bought the real estate."<sup>164</sup> But the court of appeals determined that the Appellants' were entitled to some interest based on the post-judgment statutory rate calculated from the date of the Irwin mortgage payoff.<sup>165</sup>

On appeal, citing Indiana's quiet title statute, the Appellants also asserted that they should be permitted to request a sheriff's sale of the residence.<sup>166</sup> The court of appeals agreed and reversed the trial court's decision denying the Appellants' right to enforce their lien through a sheriff's sale.<sup>167</sup> The court noted that Indiana law permits any person who may enforce a foreclosure judgment to request a sheriff's sale. Moreover, the court appeals cited Indiana Code section 32-30-12-2, which states that, in a foreclosure action, "the sale of the mortgage property *shall* be ordered in all cases."<sup>168</sup> The court found that, if the legislature desired to permit only the prevailing party to request a sale, it could have drafted

---

159. *Id.* at 475.

160. *Id.* at 475-76.

161. *Id.* at 476.

162. *Id.*

163. *Id.* at 477.

164. *Id.* at 476.

165. *Id.* at 477.

166. *Id.* (citing IND. CODE § 32-30-2-20 (2008)).

167. *Id.* at 479.

168. *Id.* at 478 (quoting IND. CODE § 32-30-2-20).



more specific statutory language. Instead, the court of appeals noted that the legislature chose more general language that likely reflects “the nature of judgments in foreclosure proceedings, which often adjudicate the rights of numerous parties.”<sup>169</sup>

*B. Notary Statute/Failure to Produce Promissory Note*

In *Bonilla v. Commercial Services of Perry, Inc.*,<sup>170</sup> the court of appeals addressed whether a party had successfully rebutted the presumption, under Indiana law,<sup>171</sup> that the party had signed a mortgage where a notary public did not notarize the signature on the mortgage. The court of appeals further addressed whether damages were owed to a mortgagee where the mortgagee was unable to produce the promissory notes evidencing the terms and conditions relating to the debt.

Ceasario Bonilla was chairman and CEO of Industrial National Bank (the “Bank”) and owned a gas station.<sup>172</sup> On March 16, 1984, Ceasario secured a \$60,500 mortgage against the gas station from the Bank. The mortgage bore the signatures of Ceasario and his wife Alicia Bonilla.<sup>173</sup> On April 20, 1985, Ceasario secured a second mortgage from the Bank on the same property for \$82,000, which again included the signatures of Ceasario and Appellant.<sup>174</sup> Subsequently, the Federal Deposit Insurance Corporation took over the Bank, and its assets, including the Bonilla mortgages, were transferred to Commercial Services of Perry, Inc. (“Perry”).<sup>175</sup> On March 31, 2000, Perry filed a foreclosure action for failure of the Bonillas to pay any amounts due to anyone at any time under either of the mortgages.<sup>176</sup>

Ceasario died in 1991, which meant Appellant was the sole remaining signatory to the mortgages at the time of Perry’s complaint.<sup>177</sup> Appellant denied ever signing either mortgage. At trial, Appellant presented handwriting samples that appeared to indicate that her signature was different than the signatures set forth on the mortgages.<sup>178</sup> But the trial court also determined that Appellant, through her own repeated admissions, knew about the debts and the mortgages, and that she benefited from the funds received from the Bank.<sup>179</sup> The trial court

---

169. *Id.*

170. 900 N.E.2d 22 (Ind. Ct. App. 2009).

171. Indiana Code § 33-42-2-6 (2008) provides: “The official certificate of a notary public, attested by the notary’s seal, is presumptive evidence of the facts stated in cases where, by law, the notary public is authorized to certify the facts.”

172. *Bonilla*, 900 N.E.2d at 23.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 23-24.

177. *Id.* at 24.

178. *Id.*

179. *Id.* at 25.

found in favor of Perry, and Appellant appealed.

In deciding whether Appellant rebutted the legal presumption that she signed the mortgages, the court of appeals stated that under Indiana Code section 33-42-2-6, “[t]he official certificate of a notary public, attested by the notary’s seal, is presumptive evidence of the facts stated in cases where, by law, the notary public is authorized to certify the facts.”<sup>180</sup> The court of appeals stated that such presumption applies to notarized mortgages and imposed the burden to meet or rebut the presumption on the party against whom it was directed.<sup>181</sup> Relying on the supreme court’s decision in *Schultz v. Ford Motor Co.*, the court of appeals further stated that a finder of fact is required to find the presumption to be fact unless the opponent can persuade the fact finder otherwise.<sup>182</sup> The court of appeals then noted that the trial court found that Appellant’s testimony and handwriting samples were not enough to overcome the presumption and declined to reweigh the evidence presented at trial; therefore, holding that Appellant failed to rebut the presumption contained in Indiana Code section 33-42-2-6.<sup>183</sup>

In determining whether Perry was entitled to the damages ordered by the trial court, the court of appeals noted that in the first appeal of the case, a different panel of the court had already held that Perry did not need to produce the signed promissory notes in order to recover the debt.<sup>184</sup> The court of appeals noted that the panel reached this conclusion in reliance on the Indiana Supreme Court’s findings in *Yanoff v. Muncy*,<sup>185</sup> and its interpretation of Indiana Code section 26-1-3.1-309, which provides that

[a] person not in possession of an instrument is entitled to enforce the instrument if: (1) the person was in possession of the instrument was entitled to enforce the instrument when loss of possession occurred; . . . (2) the loss of possession was not the result of a transfer by the person or a lawful seizure; and (3) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.<sup>186</sup>

The Indiana Court of Appeals further noted that the statute also provides that a person seeking to enforce an instrument without the actual instrument must prove the terms of the instrument and the person’s right to enforce the instrument, and if such proof is made, then, pursuant to the statute, the person seeking

---

180. *Id.* at 27 (quoting IND. CODE § 33-42-2-6 (2008)).

181. *Id.*

182. *Id.* (referencing *Schultz v. Ford Motor Co.*, 857 N.E.2d 977, 982 (Ind. 2006)).

183. *Id.* at 28.

184. *Id.* at 28-29 (citing *Commercial Servs. of Perry, Inc. v. Bonilla*, 45A03-0511-CV-536, slip op. at 5-6 (Ind. Ct. App. Sept. 6, 2006)).

185. *Id.* at 29 (citing *Yanoff v. Muncy*, 688 N.E.2d 1259, 1261-62 (Ind. 1997)).

186. IND. CODE § 26-1-3.1-309 (Supp. 2009).



enforcement is deemed to have produced the instrument.<sup>187</sup>

The court rejected Appellant's argument that the trial court erred in determining the damages owed to Perry because without the promissory notes and the other loan documents, payment record, etc., there was no way to determine the terms of the loans with respect to term, amounts owed and whether a default had occurred.<sup>188</sup> The court found, based on the mortgages submitted at trial that the trial court record contained undisputed evidence of the terms and conditions of the loans, and that Appellants concession that no payments had ever been made on the loans for over twenty years provided a reasonable inference that a default had occurred.<sup>189</sup> Based on these findings, the court of appeals reaffirmed the trial court's decision relating to the damages owed to Perry.<sup>190</sup>

Several months later, the court addressed another case involving a mortgagee's inability to produce a signed promissory note evidencing the debt owed to it. In *Baldwin v. Tippecanoe Land & Cattle Co.*,<sup>191</sup> the court was asked to resolve whether the failure of a mortgagee to provide a signed copy of a promissory note signed by the mortgagor prevented the mortgagee from foreclosing on its mortgage lien.<sup>192</sup>

Tippecanoe Land & Cattle Company held a second mortgage on certain real property owned by Brian B. Baldwin, an attorney.<sup>193</sup> Tippecanoe Land sought to foreclose the second mortgage and filed a complaint with a mortgage document and an attached promissory note that was unsigned but indicated that Baldwin prepared the document.<sup>194</sup> Baldwin filed a general denial and signed the answer but did not include an oath.<sup>195</sup> In response to Tippecanoe Land's motion for summary judgment, Baldwin, representing himself pro se in the matter, argued that the note was unenforceable because it had not been signed.<sup>196</sup> The trial court granted summary judgment in favor of Tippecanoe Land and Baldwin appealed.<sup>197</sup>

On appeal, Tippecanoe Land argued that, pursuant to Indiana Trial Rule 9.2(B), execution of the promissory note by Baldwin had been established.<sup>198</sup> As noted by the court, Trial Rule 9.2(b) provides that a written instrument attached to a complaint shall be deemed executed unless execution of the instrument is

---

187. *Bonilla*, 900 N.E.2d at 29.

188. *Id.* at 30.

189. *Id.* at 29-30.

190. *Id.* at 30.

191. 912 N.E.2d 902 (Ind. Ct. App. 2009), *reh'g denied*, No. 55A01-0902-CV-52, 2009 Ind. App. LEXIS 2516 (Ind. Ct. App. Nov. 13, 2009).

192. *Id.* at 904.

193. *Id.* at 903.

194. *Id.*

195. *Id.*

196. *Id.* at 904.

197. *Id.*

198. *Id.*

denied under oath in a responsive pleading or by an affidavit.<sup>199</sup> Because Baldwin did not verify or otherwise include an oath in his general denial answer, Tippecanoe Land argued that the note was deemed executed.<sup>200</sup>

The court agreed with Tippecanoe Land's position and affirmed the trial court's entry of summary judgment in favor of Tippecanoe Land.<sup>201</sup>

### *C. Judgment Liens*

In *Johnson v. Johnson*,<sup>202</sup> the Indiana Court of Appeals determined whether a trial court had the authority to subordinate a judgment lien after a final decree had been entered in connection with a divorce proceeding. Gina Johnson (the "wife") and Robert Johnson (the "husband") entered into a settlement agreement in connection with their divorce, pursuant to which the court granted the husband title to the couple's real estate and ordered him to make regular payments to the wife.<sup>203</sup> The husband and wife had operated a farming business on the real estate and maintained a business line of credit secured by a mortgage on the real estate.<sup>204</sup> After the settlement agreement was signed, the husband later sought to renew and refinance the line of credit, but the husband's lender identified the judgment lien arising out of the settlement agreement and required that the wife subordinate her lien to that of the lender.<sup>205</sup> The wife refused and the husband filed for declaratory relief.<sup>206</sup> The trial court ordered the wife to subordinate her judgment lien to that of the lender and the wife appealed.<sup>207</sup>

On appeal the wife, contended, among other matters, that the trial court lacked authority to subordinate her judgment lien after the final decree in the divorce proceeding had been entered.<sup>208</sup> The wife argued that a trial court may order the modification of the lien as part of its division of the marital property but only at the time of the final decree.<sup>209</sup>

In reaching its decision, the court noted that, under Indiana law, a judgment lien is purely statutory.<sup>210</sup> It also noted Indiana Code section 34-55-9-2 which provides that "'all final judgments for the recovery of money or costs . . . constitute a lien upon real estate and chattels real liable to execution in the county where the judgment had been duly entered and indexed.'" <sup>211</sup> The court

---

199. *Id.* (citing IND. TRIAL R. 9.2(b) (2009)).

200. *Id.*

201. *Id.* at 905.

202. 902 N.E.2d 830 (Ind. Ct. App. 2009), *superseded*, 920 N.E.2d 253 (Ind. 2010).

203. *Id.* at 831-32.

204. *Id.* at 832-33.

205. *Id.*

206. *Id.*

207. *Id.* at 833.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* (quoting IND. CODE § 34-55-9-2 (2008)).



of appeals then cited the supreme court's decision in *Franklin Bank & Trust Co. v. Reed*,<sup>212</sup> where the "Supreme Court determined that where one spouse is ordered to pay the other spouse money in installments, such final judgment automatically creates a judgment lien, 'except where the exercise of the court's discretion would specifically eliminate it.'"<sup>213</sup>

Finally, after further review and discussion of the *Franklin* case, the court rejected the wife's argument that *Franklin* mandated that the trial court can only exercise its authority to modify a judgment lien at the time the final decree is entered by "express positive action," and held that although it is true that a court "may exercise its inherent power and eliminate a judgment lien only by positive action," nothing in *Franklin* precluded the court from modifying or subordinating a judgment lien by positive action after the entry of the final decree.<sup>214</sup>

Several months later, the court addressed another case involving a wife's judgment lien against marital property. In *Lobb v. Hudson-Lobb*,<sup>215</sup> the Indiana Court of Appeals decided whether a money judgment awarded to a wife in a divorce proceeding constituted a judgment lien against certain real estate distributed to the husband in the divorce proceeding.<sup>216</sup>

In April 2004, Kevin Lobb (the "husband") filed for divorce from Melissa Hudson-Lobb (the "wife").<sup>217</sup> At the divorce hearing in March 2005, the husband and wife presented an oral settlement agreement to the court.<sup>218</sup> Thereafter, the court ordered the dissolution of the marriage and directed that a proposed decree be prepared and submitted.<sup>219</sup> On June 22, 2005, the husband executed a mortgage, secured by the marital residence in favor of his parents (the "Lobbs").<sup>220</sup> A month later the dissolution decree was entered. It provided that possession of the marital residence was to go to the husband subject to the wife's right to an immediate \$50,000 payment plus a second \$50,000 payment within ninety days of wife's departure from the marital residence, or upon the sale of the marital residence.<sup>221</sup> The initial payment was made; however, the husband never paid and the wife never received the second payment.<sup>222</sup> The husband later sold the marital residence to the Lobbs.<sup>223</sup> In connection with their acquisition of the marital residence, the Lobbs obtained a title search, which revealed the marital dissolution decree, but listed only the lien filed by the wife's attorney for

---

212. *Franklin Bank & Trust Co. v. Reed*, 508 N.E.2d 1256 (Ind. 1987).

213. *Id.* (quoting *Franklin*, 508 N.E.2d at 1259).

214. *Id.* at 833-34 (quoting *Franklin*, 508 N.E.2d at 1259).

215. 913 N.E.2d 288 (Ind. Ct. App. 2009).

216. *Id.* at 289.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 290.

221. *Id.*

222. *Id.* at 292.

223. *Id.*

payment of attorney's fees and not the money judgment in favor of the wife.<sup>224</sup> After the sale, the wife sought to foreclose her judgment lien for the husband's non-payment of the amount owed under the dissolution decree against the marital residence, and the Lobbs objected.<sup>225</sup> The trial court found in favor of the wife and ordered the sale of the marital residence to satisfy her lien.<sup>226</sup> The Lobbs appealed.<sup>227</sup>

On appeal, the Lobbs asserted that the money judgment ordered to the wife in connection with the divorce did not constitute a judgment lien because the dissolution decree had not been recorded.<sup>228</sup>

Citing the Indiana Supreme Court's decision in *Franklin*, the court stated that a judgment lien is created automatically in divorce situations wherein one spouse is ordered to pay the other a sum of money.<sup>229</sup> The court also noted that although the title search only mentioned the decree generally, and the attorney's lien specifically, the wife's lien had priority because the Lobbs knew that payment to the wife had been ordered but not paid.<sup>230</sup> Based on the foregoing determinations, the court held that the wife's judgment lien was enforceable against the Lobbs, and affirmed the trial court's decision ordering the sheriff's sale of the marital residence.<sup>231</sup>

#### *D. Guarantors*

In *TW General Contracting Services, Inc. v. First Farmers Bank & Trust*,<sup>232</sup> the Indiana Court of Appeals addressed the obligations of guarantors with respect to renewal promissory notes executed in favor of a lender after the date of the guarantors' initial guaranties. On May 11, 2005, TW General Contracting Services, Inc. ("Borrower") obtained a loan from First Farmers Bank & Trust ("Lender") and delivered two notes (the "May 2005 Notes") in favor of Lender that were secured by certain real property located in Tipton, Indiana.<sup>233</sup> Although the May 2005 Notes did not reference the existence of any guaranties, two identical guaranties (each a "Guaranty" and together as "Guaranties"), executed by Jack and Carolyn Taylor (the "Taylors") and Harland and Delores Wendorf (the "Wendorfs") (the Taylors and the Wendorfs, collectively as the

---

224. *Id.* at 293.

225. *Id.* at 292.

226. *Id.* at 294.

227. *Id.*

228. *Id.* at 294-95.

229. *Id.* at 295 (citing *Franklin Bank & Trust Co. v. Reed*, 508 N.E.2d 1256, 1259 (Ind. App. 1987)).

230. *Id.* at 296.

231. *Id.*

232. 904 N.E.2d 1285 (Ind. Ct. App. 2009), *reh'g denied*, No. 80A04-0901-CV-5, 2009 Ind. App. LEXIS 735 (Ind. Ct. App. June 12, 2009).

233. *Id.* at 1286.



“Guarantors”), were delivered to Lender as security for the mortgage loan.<sup>234</sup>

Under the terms of the Guaranties, the Guarantors guaranteed to Lender “the payment and performance of each and every debt, liability or obligation of every type and description which Borrower may now or any time hereafter owe to Lender.”<sup>235</sup> Additionally, the Guaranties authorized Lender to “enter into transactions resulting in the creation or continuance of indebtedness, without any consent or approval by the [Guarantors].”<sup>236</sup>

Borrower renewed the second May 2005 note three times in 2006 and 2007 and delivered two additional notes to Lender in 2007 (the “2006/2007 Notes”).<sup>237</sup> Alleging Borrower’s default on the terms of the 2006/2007 Notes, Lender filed a complaint on February 25, 2008, seeking foreclosure of the 2006/2007 Notes against the Borrower and Guarantors.<sup>238</sup> On September 16, 2008, the trial court entered an order granting Lender judgment for \$387,594.73, plus various costs and fees.<sup>239</sup>

Borrower and Guarantors appealed the trial court’s decision.<sup>240</sup> On appeal, Guarantors asserted that the Guaranties did not secure the 2006/2007 Notes, and further asserted that once the May 2005 Notes were satisfied, new guaranties would have been necessary to secure the 2006/2007 Notes.<sup>241</sup> The Guarantors also argued that the 2006/2007 Notes constituted a material alteration of the underlying debt obligation secured by the Guaranties, thereby relieving the Guarantors of their obligations.<sup>242</sup>

In its review of the case, the court noted that the same rules applicable to other contracts govern the interpretation of a guaranty agreement and that the court was to give effect to the intentions of the parties as demonstrated by the language of the Guaranties in light of the surrounding circumstances.<sup>243</sup> The court further stated that “the terms of a guaranty should neither be so narrowly interpreted as to frustrate the obvious intent of the parties, nor so loosely interpreted as to relieve the guarantor of a liability fairly within their terms.”<sup>244</sup> The court proceeded to examine the language of the Guaranties themselves, finding that the Guarantors “offered their absolute and unconditional Guaranties to the Lender to ‘induce’ it to make loans to [Borrower] ‘at any time.’”<sup>245</sup>

---

234. *Id.*

235. *Id.* at 1288 (emphasis deleted).

236. *Id.* at 1289.

237. *Id.* at 1286.

238. *Id.*

239. *Id.* at 1287.

240. *Id.* at 1286.

241. *Id.* at 1287.

242. *Id.*

243. *Id.* at 1288 (citing *Kruse v. Nat’l Bank of Indianapolis*, 815 N.E.2d 137, 144 (Ind. Ct. App. 2004)).

244. *Id.* (quoting *Bruno v. Wells Fargo Bank, N.A.*, 850 N.E.2d 940, 945-46 (Ind. Ct. App. 2006)).

245. *Id.* at 1290.

The court rejected the Guarantors contention that the Guaranties were inapplicable to the 2006/2007 Notes merely because said notes did not reference the Guaranties, reminding the Guarantors that the May 2005 Notes did not specifically mention the Guaranties either.<sup>246</sup> Instead, the court held that the broad nature of the Guaranties themselves should have served as notice to the Guarantors that the 2006/2007 Notes would be considered “a logical continuation of the mutually beneficial lender-borrower-guarantor arrangement.”<sup>247</sup>

Citing *S-Mart, Inc. v. Sweetwater Coffee Co.*,<sup>248</sup> the court also rejected the Guarantors’ argument that they were relieved from their obligations due to the material alteration of the debt secured as evidenced by the 2006/2007 Notes.<sup>249</sup> Based on the clear, all-encompassing language of the Guaranties and the facts of the present case, the court found the *S-Mart* case inapposite.<sup>250</sup> The court affirmed the trial court’s judgment in favor of Lender, noting that the Guaranties extended to the 2006/2007 Notes because the provisions of the Guaranties assured payment of “each and every debt” which Borrower owed to Lender.<sup>251</sup> Guarantors beware.

## VI. QUIET TITLE ACTIONS

In *Capps v. Abbott*,<sup>252</sup> the Indiana Court of Appeals resolved a boundary line dispute between adjacent landowners and addressed whether a landowner retained a prescriptive easement right for use of an access road. Coy L. Capps and Margaret M. Capps (the “Capps”) and Jeffrey A. Abbott and Teresa J. Abbott (the “Abbotts”) were adjacent landowners. The only access to Abbotts’ land to and from the nearest public right-of-way, known as State Road 19, was via a private drive known as Walnut Street, located partially on Capps’ land.<sup>253</sup> Since at least the early 1970s, “the Abbotts, their predecessors-in-title, and their invitees [had] continuously used Walnut Street for ingress and egress from their property.”<sup>254</sup> In 1990, the Capps and the Abbotts performed a survey to determine the boundary line between their properties and constructed a fence along the boundary line denoted by the survey.<sup>255</sup> But a subsequent survey performed in 2006 showed inconsistencies with the 1990 survey and revealed that the Capps actually owned a .021 acre tract of land on the other side of the fence.<sup>256</sup> The new survey also disclosed that Walnut Street had never been

---

246. *Id.*

247. *Id.*

248. *S-Mart, Inc. v. Sweetwater Coffee Co.*, 744 N.E.2d 580 (Ind. Ct. App. 2001).

249. *Id.* at 1291 n.3 (citing *S-Mart*, 744 N.E.2d 580).

250. *Id.*

251. *Id.* at 1290-91.

252. 897 N.E.2d 984 (Ind. Ct. App. 2008).

253. *Id.* at 985.

254. *Id.*

255. *Id.* at 986.

256. *Id.*



platted or publicly dedicated and thus was strictly a private access road. Because the new 2006 survey, the Capps requested that the Abbotts no longer use Walnut Street to access their land.

Thereafter, the Abbotts filed a complaint to quiet title to the .021 acre tract and requested that they continue to have the right to use Walnut Street for access purposes.<sup>257</sup> The trial court found in favor of the Abbotts and entered an order granting the Abbotts their requested relief.<sup>258</sup> The trial court held that the Abbotts had acquired title to the .021-acre tract through both the theory of estoppel and the theory of adverse possession, and that they had the right to use Walnut Street pursuant to a prescriptive easement.<sup>259</sup> The Capps appealed the ruling of the trial court asserting that the evidence was insufficient for the trial court to conclude that the Abbotts had acquired ownership of the .021-acre tract, or that they had the right to use Walnut Street by means of a prescriptive easement.

In reviewing the case, the court of appeals cited *Freiburger v. Fry*, where the court of appeals held that when parties “agree to erect a fence and treat it as a boundary line they are estopped from denying” that the fence line is the boundary line.<sup>260</sup> Applying this to the case at hand, the court of appeals concluded that the Capps were estopped from denying that the fence constituted the legal boundary line for the properties and affirmed the trial court’s finding.<sup>261</sup> This determination by the court of appeals made an analysis of the adverse possession claim unnecessary.<sup>262</sup>

Using a factual analysis, the court of appeals also determined that the Abbotts had satisfied the elements for a prescriptive easement. Citing Indiana Code section 32-23-1-1, the court of appeals noted that “the right-of-way, air, light, or other easement from, in, upon, or over land owned by a person may not be acquired by another person by adverse use unless the use is uninterrupted for at least twenty (20) years.”<sup>263</sup> The court of appeals stated that “Indiana cases have also required that the evidence demonstrate an actual, hostile, open, notorious, continuous, uninterrupted, and adverse use for twenty (20) years under a claim of right, or such continuous, adverse use with knowledge and acquiescence of the owner.”<sup>264</sup> Citing the Indiana Supreme Court’s opinion in *Wilfong v. Cessna Corp.*, the court of appeals further noted that a prescriptive easement would not be established if the party claiming such right had been granted permission to use the land.<sup>265</sup>

---

257. *Id.*

258. *Id.*

259. *Id.* at 987.

260. *Id.* at 987-88 (quoting the trial court (citing *Freiburger v. Fry*, 439 N.E.2d 169, 172 (Ind. Ct. App. 1982))).

261. *Id.* at 988.

262. *Id.*

263. *Id.* (quoting IND. CODE § 32-23-1-1 (2008)).

264. *Id.* (citations omitted).

265. *Id.* (citing *Wilfong v. Cessna Corp.*, 838 N.E.2d 403, 406-08 (Ind. 2005)).

Upon review of the trial record, the court of appeals held that the Abbotts and their predecessors-in-title had continuously used Walnut Street for a period of at least twenty years without permission, and that such use was adverse to the Capps and their predecessors-in-title, thereby affirming the trial court's ruling that the Abbotts had obtained a prescriptive easement for the use of Walnut Street.<sup>266</sup>

In *Timberlake, Inc. v. O'Brien*,<sup>267</sup> the court of appeals resolved a quiet title action involving a railroad right-of-way. In 1973, Timberlake, Inc. purchased forty acres of real estate.<sup>268</sup> At the time of Timberlake's purchase, a right-of-way easement in favor of CSX, a railroad company, encumbered the property over a ninety-nine-foot wide strip of land (the "Railroad Property") that ran in a northwestern direction over Timberlake's property as part of a railroad corridor.<sup>269</sup> CSX's predecessor-in-interest had obtained the right-of-way easement over the Railroad Property pursuant to three separate deeds (the "1881 Deeds").<sup>270</sup> In July 1988, CSX filed a notice with the Interstate Commerce Commission (the "ICC") indicating its intent to abandon the railroad running over Timberlake's property.<sup>271</sup> In June 1990, "before it had removed its rails, ties, and ballast, CSX conveyed its interest in the Railroad Property by quitclaim deed to O'Brien, who already owned a nearby golf course and parcels of land adjacent to the Railroad Property."<sup>272</sup>

In March 2004, O'Brien cleared part of the Railroad Property and placed a large metal barrier on the land, blocking Timberlake's access to its property.<sup>273</sup> Subsequently, Timberlake sued O'Brien to quiet title to the Railroad Property and for trespass, requesting both that Timberlake be declared to have an easement by necessity and that O'Brien be enjoined from blocking access to Timberlake's property. The trial court held that the 1881 Deeds only conveyed an easement to CSX, rather than a fee simple interest in the Railroad Property.<sup>274</sup> The trial court further held that CSX did not abandon its operations over the Railroad Property prior to executing and delivering the quitclaim deed to O'Brien and that O'Brien's use of the Railroad Property was limited to use as a railroad right of way as set forth in the 1881 Deeds.<sup>275</sup>

Both Timberlake and O'Brien appealed the trial court's decision.<sup>276</sup> On appeal, Timberlake asserted that the trial court erred when it determined that CSX conveyed a railroad right-of-way easement to O'Brien. Timberlake argued

---

266. *Id.* at 990.

267. 902 N.E.2d 843 (Ind. Ct. App. 2009).

268. *Id.* at 845.

269. *Id.*

270. *Id.*

271. *Id.* at 847.

272. *Id.*

273. *Id.* at 848.

274. *Id.*

275. *Id.*

276. *Id.* at 849.



that CSX had abandoned the Railroad Property before the conveyance and thus, could not convey any interest to O'Brien. On cross-appeal, O'Brien requested a reversal the trial court's ruling, and that he be adjudged as the fee simple owner of the Railroad Property. In the alternative, O'Brien asserted that he, at a minimum acquired a general easement for ingress and egress "to pass and repass . . . engines, cars, horses, cattle, carts, wagons, and other vehicles," as set forth in the 1881 Deeds.<sup>277</sup>

In reaching its decision, the court of appeals noted that under Indiana law, the general rule is that a conveyance to a railroad of a strip, piece, or parcel of land, without additional language as to the use or purpose to which the land is to be put or in other ways limiting the estate conveyed, is to be construed as passing an estate in fee, but reference to a right-of-way in such conveyance typically leads to its construction as conveying only an easement.<sup>278</sup>

The court further noted that the language in the 1881 Deeds were "for a right of way" and were limited to purposes connected with the use of a railroad.<sup>279</sup> The court of appeals then held that based on the clear language of the 1881 Deeds which indicated the conveyance of a right-of-way, and due to the limitations on use set forth in the 1881 Deeds, that only an easement right had been conveyed, and therefore CSX could not of conveyed fee simple title to O'Brien; thereby, the court affirmed the trial court's decision.<sup>280</sup>

The court of appeals rejected Timberlake's claim that CSX had abandoned the Railroad Property when it filed its notice with the ICC, before its quitclaim deed to O'Brien, and that the easement should therefore be extinguished, and Timberlake should have the right to reclaim the Railroad Property free of the easement.<sup>281</sup> The court of appeals, citing Indiana Code section 8-4-35-4(a), noted that a railroad right-of-way is deemed abandoned when the ICC issues a certificate authorizing the abandonment and the railroad removes the rails, switches, and ties from the right of way.<sup>282</sup> The court of appeals found that, although CSX filed its notice with the ICC, the ICC did not issue a certificate authorizing the abandonment and it did not remove its tracks until after delivery of the deed to O'Brien. Therefore, the Railroad Property had not been abandoned prior to delivery of the quitclaim deed to O'Brien.<sup>283</sup>

---

277. *Id.* at 849.

278. *Id.* at 850 (citing *L & G Realty & Constr. Co. v. City of Indianapolis*, 139 N.E.2d 580, 585 (Ind. Ct. App. 1957)).

279. *Id.* at 851.

280. *Id.*

281. *Id.* at 852.

282. *Id.*

283. *Id.* at 853.

Finally, the court of appeals rejected O'Brien's argument that he had acquired broad access easement rights over the Railroad Property. Based on the express provisions set forth in the 1881 Deeds, the court of appeals determined that the easement granted was restricted to an easement for a railroad right-of-way, and affirmed the trial court's decision.<sup>284</sup>

---

284. *Id.*



# RECENT DEVELOPMENTS IN INDIANA TAXATION SURVEY 2009

LAWRENCE A. JEGEN, III\*  
JAMES B. WILLIAMS\*\*  
TOM D. CONLEY\*\*\*

## INTRODUCTION: SOME REFERENCES USED IN THIS ARTICLE

This Article highlights the major tax developments that occurred through the calendar year of 2009. Whenever the term “GA” is used in this Article, such term refers only to the 116th Indiana General Assembly. Whenever the term “Governor” is used in the Article, such term refers only to the Governor of Indiana who was serving in office during the 116th General Assembly. Whenever the term “Tax Court” is referred to in this Article, such term refers only to the Indiana Tax Court. Whenever the term “DLGF” is used in this Article, such term refers only to the Indiana Department of Local Government Finance. Whenever the term “IBTR” is used, such terms refers only to the Indiana Board of Tax Review. Whenever the term “SBTC” is used in this Article, such term refers only to the Indiana State Board of Tax Commissioners. Whenever the term “Department” is used, such term refers only to the Indiana Department of State Revenue. Whenever the term “IC” or “Indiana Code” is used, such term refers only to the Indiana Code in effect at time of the publication of this Article. Whenever the term “ERA” is used, such term refers only to an Indiana Economic Revitalization Area. Whenever the term “CAGIT” is used, such term refers only to the Indiana County Adjusted Gross Income Tax. Whenever the term “COIT” is used in the Article, such term refers only to the Indiana County Option Income Tax. Whenever the term “LOIT” is used in this Article, such term refers only to the Local Option Income Tax. Whenever the term “IEDC” is used, such term refers only to the Indiana Economic Development Corporation. Whenever the term “CEDIT” is used, such term refers only to the Indiana County Economic Development Income Taxes. Whenever the term “IEDIT” is used, such term refers only to the Indiana Economic Development Income Tax. Whenever the term “BMV” is used in this Article, such term refers only to the Indiana Bureau of Motor Vehicles. Whenever the term “IRC” is used, such term refers only to the Internal Revenue Code which is in effect at the time of the publication of this Article. Whenever the term “AOPA” is used in this Article, such term refers only to the Indiana Administrative Orders and Procedures Act. Whenever the term “CBTCPR” is used, such term refers only to the County Board of Tax and Capital Projects.

---

\* Thomas F. Sheehan Professor of Tax Law and Policy, Indiana University School Law—Indianapolis; B.A., Beloit College; M.B.A., J.D., University of Michigan; L.L.M., New York University.

\*\* J.D. Candidate, 2010, Indiana University School of Law—Indianapolis; B.A., 1998, Knox College; M.A., 2000, Northeastern University.

\*\*\* Deputy Director of Tax Policy, Indiana Department of State Revenue.

Whenever the term “PTABOA” is used in this Article, such term refers only to a Property Tax Assessment Board of Appeals.

### I. INDIANA GENERAL ASSEMBLY LEGISLATION

The 116th GA passed several pieces of legislation affecting various areas of state and local taxation including property taxes, sales and use taxes, state income taxes, and local taxes.

#### A. Property Tax

The GA enacted a variety of changes to property tax legislation. But most of the amendments to the property tax laws are technical, and it takes an individual knowledgeable about property taxes to fully understand these amendments.

The GA made some minor administrative adjustments to the type of information that must be included on a sales disclosure form. The GA amended IC 6-1.1-5.5-5 to require that the sales disclosure form must include whether or not the transferee is using the form to claim one or more deductions under IC 6-1.1-12-44.<sup>1</sup> The GA further amended the statute to require that, if the transferee uses the sales disclosure form to claim a standard deduction under IC 6-1.1-12-37, the sales disclosure form must include sufficient instructions to permit a party to terminate that standard deduction.<sup>2</sup> The GA also amended IC 6-1.1-12-43(c)(2) to reflect this requirement.<sup>3</sup>

The GA also provided the county auditor additional power to terminate deductions if a taxpayer fails to comply with certain requirements. The GA amended IC 6-1.1-12-17.8 to give the county auditor discretion to terminate a deduction under IC 6-1.1-12-37 for assessment dates after January 15, 2012, if the individual seeking a deduction failed to comply with IC 6-1.1-22-8.1-b(9) before January 1, 2013.<sup>4</sup> In order to terminate the deduction, the county auditor must mail notice of the termination to the last known address of the person liable for the property tax or to the last known address of the most recent owner of the property.<sup>5</sup> The GA also amended the statute to require an individual who has become ineligible for the standard deduction under IC 6-1.1-12-37 to notify the auditor of that ineligibility.<sup>6</sup> The GA further amended the statute to allow cooperative housing corporations to continue to receive a deduction under IC 6-1.1-12-37 for the current calendar without filing a statement if the cooperative housing corporation continues to remain eligible for the deduction.<sup>7</sup> Along the same line, the GA amended the statute to allow an individual who was eligible

---

1. 2009 Ind. Acts 727.

2. *Id.*

3. *Id.* at 737.

4. *Id.* at 728.

5. *Id.*

6. *Id.*

7. *Id.* at 730.



for a homestead credit to remain eligible without filing a statement to that effect.<sup>8</sup> But the law gave the county auditor discretion to terminate the deduction for assessment dates after January 15, 2012, if a new statement is not filed.<sup>9</sup> The deduction may be reinstated if the taxpayer provides proof that the taxpayer is eligible.<sup>10</sup>

The GA amended IC 6-1.1-12-37 to change the definition of homestead in order to limit it to an individual's principal place of residence located in Indiana, which the individual owns, is buying on contract, or is entitled to occupy as a tenant-stockholder.<sup>11</sup> The GA further amended the statute to specifically exclude property owned by corporations, partnerships, LLCs, or other entities not described in the primary definition.<sup>12</sup> The GA also amended the statute to require taxpayers to file a statement to claim the deduction.<sup>13</sup> This statement must include the parcel number, city, town or township, name of any other location of property owned by the applicant or applicant's spouse, applicant's name, and last five digits of applicant's or applicant's spouse's social security number.<sup>14</sup> Furthermore, the GA amended the statute to require the taxpayer to notify the auditor of any change in the property's use that would effect the property's eligibility for the deduction.<sup>15</sup> Finally, the GA amended the statute to require the DLGF to provide county auditors with access to the homestead property database.<sup>16</sup>

The GA amended IC 6-1.1-22-8.1 to require the county treasurer to send the taxpayer an explanation of the homestead credit under IC 6-1.1-20.4 and 6-3.5-6-13.<sup>17</sup> The GA further amended the statute to require the county treasurer to provide the taxpayer with a statement that must be returned by the taxpayer to the county auditor with the taxpayer's verification of eligibility for the homestead credit.<sup>18</sup> Failure to comply on the part of the taxpayer could result in the loss of the credit.<sup>19</sup> The GA also amended the statute to allow this notice to be sent by electronic mail if the county adopts an authorizing ordinance.<sup>20</sup> In order to allow this to occur, the GA further amended the statute to require the DLGF to create a form to implement and explain the electronic mail option.<sup>21</sup>

On a minor note, the GA amended IC 6-1.1-22-9.7 to change the term

---

8. *Id.*

9. *Id.* at 731.

10. *Id.*

11. *Id.* at 731-32.

12. *Id.* at 732.

13. *Id.* at 733.

14. *Id.* at 733-34.

15. *Id.* at 734-35.

16. *Id.* at 735.

17. *Id.* at 743.

18. *Id.* at 744-45.

19. *Id.* at 745.

20. *Id.* at 746.

21. *Id.* at 746-47.

“checking account” to “account of the taxpayer that is held by a financial institution” throughout the statute.<sup>22</sup>

Further, the GA amended IC 6-1.1-22.5-6 to allow the transmission of provisional statements of the county auditor via electronic mail.<sup>23</sup> Along the same line, the GA amended IC 6-1.1-22.5-8 to require that provisional statements include a checklist that shows all homestead credits and property tax deductions.<sup>24</sup> The GA further amended the statute to require the county auditor to include information in the provisional statement explaining the penalties a taxpayer could face for failing to update the taxpayer’s information if a credit or deduction no longer applies.<sup>25</sup>

The GA passed new legislation that requires a taxpayer to make a payment of the additional taxes owed within thirty days if a property is not eligible for a deduction.<sup>26</sup> This new legislation also requires each county to establish a non-reverting land fund into which these payments will be deposited.<sup>27</sup> Funds deposited into the non-reverting land fund should be treated as miscellaneous revenue and cannot be considered in the budget for the county auditor.<sup>28</sup>

The GA also passed new legislation that provides an owner of a model residence with a deduction of fifty percent of assessed value of the model residence as of the 2008 assessment date.<sup>29</sup> The property owner must file a statement with the county auditor in order to claim this deduction.<sup>30</sup>

Moreover, the GA amended IC 6-1.1-4-4 to provide that for the “general assessment that begins after July 1, 2010, the assessed value of real property shall be based on the estimated true tax value of the property on the assessment date that is the basis for taxes payable in the year following [reassessment].”<sup>31</sup> Similarly, the GA amended IC 6-1.1-4-4.5 to provide that “[f]or assessment dates after December 31, 2009, an adjustment in the assessed value of real property under [IC 6-1.1-4-4.5] shall be based on the estimated true tax value of the property on the assessment date.”<sup>32</sup> The GA amended IC 6-1.1-4-13.6 to set a deadline of March 1 of each year for the Property Tax Board of Appeals to hold a hearing on a county’s general reassessment.<sup>33</sup> The GA also amended 6-1.1-4-22 to require that a notice of assessment must include a notice alerting taxpayers of the opportunity to appeal an assessment.<sup>34</sup>

---

22. *Id.* at 750-56.

23. *Id.* at 757.

24. *Id.* at 758.

25. *Id.* at 758-59.

26. *Id.* at 762.

27. *Id.*

28. *Id.* at 763.

29. *Id.* at 1729.

30. *Id.* at 1730.

31. *Id.* at 1363-64.

32. *Id.* at 1364-65.

33. *Id.* at 1365.

34. *Id.* at 1366.



With regard to tangible personal property, the GA amended IC 6-1.1-15-1 to require a taxpayer to file a notice to obtain review of tangible personal property by the county board no later than May 10 or forty-five days after the tax statement is mailed by the county treasurer regardless of whether or not the assessing official changed the assessment.<sup>35</sup>

Finally, the GA amended IC 6-1.1-22-8.1 to require the county treasurer to include an explanation that a property tax appeal “requires evidence relevant to the true tax value of the taxpayer’s property as of the assessment date.”<sup>36</sup>

### *B. Sales and Use Tax*

The GA made a number of minor changes to the Indiana Code with regard to Indiana’s sales and use taxes. The GA made some changes to ensure that Indiana complied with the Streamlined Sales and Use Tax Agreement of which Indiana is a full member, while other changes were administrative in nature.

With regard to the Streamlined Sales and Use Tax Agreement, the GA changed the sales tax definition of “gross retail income” to coincide with the Agreement.<sup>37</sup>

The GA also amended IC 6-2.5-3-6 to make watercraft that are documented vessels and registered with the Coast Guard subject to the use tax.<sup>38</sup>

The GA amended IC 6-2.5-5-8 to require that aircraft lease revenue must equal 7.5% of the value of the aircraft, but if the leased aircraft is predominately used in public transportation, it is exempt from the sales tax.<sup>39</sup> This provision applies retroactively to January 1, 2008.<sup>40</sup>

The GA also amended IC 6-2.5-5-13 to provide a sales tax exemption for cable equipment used at a headend or similar facility operated by a person furnishing video services.<sup>41</sup>

In addition, the GA amended IC 6-2.5-5-18 and 6-2.5-5-19.5 to allow for a sales tax exemption for glucose-monitoring equipment and devices whether or not the items are prescribed for the patient.<sup>42</sup> The GA also repealed the sales tax exemption for media production expenditures.<sup>43</sup>

In an effort to take advantage of new technology, the GA amended IC 6-2.5-6-1 to require retailers that register as retail merchants after December 31, 2009, to file returns and remit sales and use tax payments through the Department’s online tax filing system (INtax).<sup>44</sup> Along this same line, the GA amended IC 6-

---

35. *Id.* at 1367.

36. *Id.* at 1374-75.

37. *Id.* at 2468-70.

38. *Id.* at 2470.

39. *Id.* at 2472.

40. *Id.*

41. *Id.* at 2473-74.

42. *Id.* at 2474-75.

43. *Id.* at 2855.

44. *Id.* at 2476.

2.5-7-10 to require taxpayers that collect prepaid sales tax from motor fuel retailers to make their semi-monthly remittance and reporting of sales and use taxes through the Department's electronic filing system.<sup>45</sup>

The GA added IC 6-2.5-6-17 to require a retail merchant that is a consignee to collect and remit the sales tax based on the gross retail income of the consignment sale.<sup>46</sup>

In an effort to both encourage alternative fuel use and offer the State Budget Agency some flexibility, the GA amended IC 6-2.5-7-5 to eliminate the \$1 million annual cap on the E85 deduction that may be claimed and allow the State Budget Agency to determine the amount of the annual cap.<sup>47</sup> The statute requires the agency—before August 1 of each year—to estimate whether there are sufficient funds available to provide the deduction and, if there are not, the program can be suspended for the subsequent calendar year.<sup>48</sup> The E85 deduction will be granted only for retail sales occurring from January 1 through March 31 of a calendar year.<sup>49</sup> The State Budget Agency has authority to suspend the deduction during the reporting period if it is determined that sufficient funds are not available.<sup>50</sup>

In an effort to offer the state some flexibility, the GA amended IC 6-2.5-7-14 to require the Department to adjust the prepaid sales tax rate for gasoline semi-annually, and more often than semi-annually, if the average retail price of gasoline changes by more than twenty-five percent from the last determination.<sup>51</sup> The amended statute further provides that the calculation for such adjustment to the prepayment rate will be based on eighty percent of the average price instead of ninety percent of the average price of gasoline before all taxes.<sup>52</sup>

The GA amended IC 6-2.5-11-10 to require the Department to provide notification of a sales tax rate change at least thirty days in advance of the change.<sup>53</sup> If sufficient notice is not provided, or the seller cannot be liable for failure to collect at the new rate.<sup>54</sup> The law provides an exception if the seller fraudulently fails to collect at the new rate.<sup>55</sup>

The GA amended IC 6-2.5-12-15 to require the sourcing of Internet access and telecommunications ancillary services to the customer's place of primary use.<sup>56</sup> The GA also amended IC 6-2.5-13-1 to make permanent the sourcing of floral wire delivery orders to the florist that takes the original order by

---

45. *Id.* at 2477.

46. *Id.* at 718.

47. *See id.* at 1546.

48. *Id.* at 1546-47.

49. *See id.*

50. *Id.*

51. *Id.* at 2478.

52. *Id.*

53. *Id.* at 2479-80.

54. *Id.*

55. *Id.* at 2480.

56. *Id.*



eliminating the sunset provision in current statute.<sup>57</sup>

### *C. Adjusted Gross Income Tax*

During 2009, the GA clarified a number of issues with regard to Indiana's adjusted gross income tax. The GA amended IC 6-3-1-3.5 to provide certain items of income be included within Indiana adjusted gross income in areas where the Indiana Code is decoupled from the IRC.<sup>58</sup> Items now required to be added back into adjusted gross income include the following: unemployment compensation excluded from federal gross income; the amount of income excluded from income for the discharge of debt on a qualified principal residence; income from the deferral of income arising from business indebtedness discharged in connection with the reacquisition after December 31, 2008; income attributed to bonus depreciation for restaurant property and retail improvements; income excluded for qualified disaster assistance property; income attributable to Section 179C to expense costs for refinery property; income attributable to expensing film or television production; and income of any taxpayer that treated a loss from the sale or exchange of Fannie Mae or Freddie Mac as an ordinary loss.<sup>59</sup> These changes were to be applied retroactively to January 1, 2009.<sup>60</sup>

The GA enacted a statute to provide an income tax deduction for property taxes paid in 2009 that would have been payable in 2008 if the property tax bills had been issued in a timely manner.<sup>61</sup> This measure was also to be applied retroactively to January 1, 2009.<sup>62</sup>

The GA amended IC 6-3-1-11 to define the IRC for purposes of the Indiana Code to be the IRC in effect on February 17, 2009.<sup>63</sup> This measure was also to be applied retroactively to January 1, 2009.<sup>64</sup>

The GA amended IC 6-3-1-34.5 to provide that "a listed property trust or other foreign real estate investment trust that is organized in a country that has a tax treaty with the United States Treasury Department governing the tax treatment of these trusts" is not a "captive real estate investment trust" for purposes of the real estate investment trust add back.<sup>65</sup> This was a technical change, and was to be applied retroactively to January 1, 2008.<sup>66</sup>

The GA added a definition of a "pass through entity" for purposes of the

---

57. *Id.* at 2483.

58. *See id.* at 57-69.

59. *Id.* at 2467-88.

60. *Id.* at 2483.

61. *See id.* at 2500-01.

62. *Id.* at 2500.

63. *Id.* at 2501.

64. *Id.*

65. *Id.* at 2502.

66. *See id.*

adjusted gross income tax.<sup>67</sup> This measure was also to be applied retroactively to January 1, 2009.<sup>68</sup>

The GA amended IC 6-3-2-2 to clarify that income derived from a pass through entity shall be treated “as if the person, corporation, or pass through entity that received the income ha[s] directly engaged in the income producing activity” in Indiana.<sup>69</sup> This measure was also to be applied retroactively to January 1, 2009.<sup>70</sup>

The GA amended both IC 6-3-2-2.5 and 6-3-2-2.6 to provide that the federal provision for a corporation or person with a net operating loss that is carried back by a qualified small business shall be limited to two years instead of five years and the carry back for a qualified disaster loss shall be limited to five years.<sup>71</sup> These measures were also to be applied retroactively to January 1, 2009.<sup>72</sup>

The GA also amended IC 6-3-2-8 and 6-3-3-10 to delete the definition of “pass through entity” as it applied to the enterprise zone employee tax deduction and the enterprise zone employer tax credit because the term has been defined in IC 6-3-1-35.<sup>73</sup> These measures were also to be applied retroactively to January 1, 2009.<sup>74</sup>

The GA enacted a statute to provide an income tax deduction for a solar-powered roof vent or fan.<sup>75</sup> The maximum deduction is limited to \$1,000 per taxpayer per taxable year. This measure was also to be applied retroactively to January 1, 2009.<sup>76</sup>

The GA amended IC 6-3-2-10 to require that the amount of unemployment compensation excluded from federal gross income be added back into an individual’s adjusted gross income when calculating the Indiana tax deduction for unemployment compensation.<sup>77</sup> This measure was also to be applied retroactively to January 1, 2009.<sup>78</sup>

The GA amended IC 6-3-3-12 to define the term “contribution” for purposes of the 529 education savings plan tax credit in order to exclude bonus points credited to the owner’s account for purchases made.<sup>79</sup> The term was also defined in a manner that excluded money transferred from other qualified tuition programs under Section 529 of the IRC.<sup>80</sup>

---

67. *See id.* at 2503.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 2509-12.

72. *Id.* at 2509, 2511.

73. *See id.* at 2514, 2517.

74. *Id.* at 2514, 2517.

75. *See id.* at 2515.

76. *Id.*

77. *Id.* at 2515-16.

78. *Id.* at 2515.

79. *Id.* at 2520.

80. *Id.*



The GA amended IC 6-3-4-8.1 to require any registered entity withholding employees' wages after December 31, 2009 to remit and report withholding payments through the Department's online tax filing program.<sup>81</sup>

Finally, the GA amended IC 6-3-4-8.2 to impose the same withholding requirements for winnings at a horse racing casino that are in place for withholding on winnings at a riverboat casino.<sup>82</sup>

#### *D. Income Tax Credits*

The GA passed legislation that clarified the application of certain tax credits, granted some new opportunities for tax credits, and eliminated the availability of some tax credits.

The GA amended IC 6-3.1-4-2 to provide a taxpayer with an alternative method of claiming the qualified research expense credit.<sup>83</sup>

The GA also extended the Hoosier Business Investment Tax Credit to December 31, 2013.<sup>84</sup> This tax credit would have otherwise expired on December 31, 2011.<sup>85</sup>

The GA amended IC 6-3.1-29-19 and enacted IC 6-3.1-29-20.7 to authorize the Indiana Finance Authority (IFA) to purchase tax credits awarded to a taxpayer that has sold synthetic natural gas to the IFA.<sup>86</sup> The IFA may pay the taxpayer for the credits over a twenty-year period.<sup>87</sup>

The GA enacted a statute that provides an income tax credit for contributions to any scholarship-granting organization participating in a school scholarship program.<sup>88</sup> The credit applies to contributions made in taxable years beginning after December 31, 2009, and the total amount of credits that may be awarded in a fiscal year may not exceed \$2.5 million.<sup>89</sup>

The GA amended IC 6-3.1-31.9-1 to include vehicles that operate on ultra-low sulfur diesel or biodiesel fuel within the scope of the Hoosier alternative fuel vehicle manufacturer income tax credit.<sup>90</sup> The GA also addressed the fuel vehicle manufacturer income tax credit by amending IC 6-3.1-31.9-2 to limit the credit for the manufacture of alternative fuel vehicles to passenger cars and light trucks with a gross vehicle weight of 8500 pounds or less.<sup>91</sup>

Finally, the GA amended IC 6-3.1-32-9 to limit the maximum amount of media production tax credits that may be allowed in a state fiscal year to no more

---

81. *Id.* at 2523.

82. *Id.* at 2523-24.

83. *Id.* at 2525.

84. *Id.* at 2525-26.

85. *Id.*

86. *Id.* at 2526-28.

87. *Id.* at 2528.

88. *See id.* at 2528-30.

89. *Id.* at 2530.

90. *Id.* at 2530-31.

91. *Id.* at 2531.

than \$2.5 million.<sup>92</sup>

### *E. Local Taxation*

1. *Local Option Income Tax*.—The GA amended IC 6-3.5-1.1, 6-3.5-6, and 6-3.5-7 to provide that the budget agency shall certify the local option income tax distributions to counties instead of the Indiana Department of Revenue.<sup>93</sup>

In a non-code provision, the GA provided that in 2009, a county may adopt an additional COIT rate at any time before November 1, 2009.<sup>94</sup>

The GA enacted IC 6-3.5-1.1-11.5, 6-3.5-6-18.6 and 6-3.5-7-16.5 to require a county auditor to distribute funds from the CAGIT no more than ten days after the county treasurer receives these funds from the state in order to address an emergency situation.<sup>95</sup>

2. *Marion County Auto Rental Tax*.—The GA amended IC 6-6-9.7-7 to allow Marion County to increase the supplemental auto rental excise tax by two percent after January 1, 2013, and before March 1, 2013, and deposit the revenue from the increase in the sports and convention facilities operating fund.<sup>96</sup>

### *F. Inheritance and Estate Tax*

In an effort to provide the Department with more time to collect the inheritance tax, the GA amended IC 6-4.1-8-1 to extend the lien that attaches at the time of the decedent's death from five years to ten years.<sup>97</sup> The lien is released when the inheritance tax is paid or it is determined that no inheritance tax return is required to be filed.<sup>98</sup>

The GA also amended IC 6-4.1-8-5 to require the person making payment to an estate because of a personal injury occurring before the decedent's death to notify the Department.<sup>99</sup> The notification must be made within ten days of the payment of the damages.<sup>100</sup>

Finally, the GA added a provision to IC 6-4.1-10-1 to provide that interest on an inheritance tax refund claim will not be paid until ninety days after the later of the date the refund claim is filed or the inheritance tax return is received by the Department.<sup>101</sup> The previous law required interest to be paid ninety days after the refund claim was filed.<sup>102</sup>

---

92. *Id.*

93. *Id.* at 2534-64.

94. *Id.* at 2862.

95. *Id.* at 336-37.

96. *Id.* at 2589.

97. *Id.* at 2564.

98. *Id.*

99. *Id.* at 1448.

100. *Id.*

101. *Id.* at 2565.

102. *Id.*



### *G. Financial Institutions Tax*

The GA amended the definition of adjusted gross income for the financial institutions tax under IC 6-5.5-1-2 to provide that certain income be added back to correspond to the decoupling from the IRC.<sup>103</sup> This measure was to be applied retroactively to January 1, 2009.<sup>104</sup>

### *H. Vehicle and Gasoline Excise Taxes*

1. *Gasoline Tax.*—The GA amended IC 6-6-1.1-606.5 to provide relief from the tax “if a shipment of gasoline is legitimately diverted from the represented destination state after the shipping paper has been issued by a terminal operator or if a terminal operator failed to cause proper information to be printed on the shipping paper.”<sup>105</sup> In order to obtain this relief, the Department must be notified of the diversion before it occurs.<sup>106</sup> This amendment changed the language in order to be consistent with the language in the special fuel tax.<sup>107</sup>

2. *Motor Carrier Fuel Use Tax.*—The GA amended IC 6-6-4.1-12 to require motor carriers to apply for their annual International Fuel Tax Agreement permits by September 1 in order to receive the permits by January 1.<sup>108</sup>

The GA amended IC 6-6-4.1-13 to allow a person to obtain a repair and maintenance permit to move an unregistered motor vehicle from a quarry or mine to a maintenance or repair facility.<sup>109</sup> The cost of this type of permit is \$40 per year.<sup>110</sup>

3. *Commercial Vehicle Excise Tax.*—The GA amended IC 6-6-5.5-1 to redefine base revenue as the Commercial Vehicle Excise Tax (CVET) collected in the fiscal year of the preceding calendar year. This definition includes a “road tractor” in the definition of commercial vehicle for purposes of the commercial vehicle excise tax.<sup>111</sup>

The GA amended IC 6-6-5.5-7 to provide that the annual CVET rate be determined by multiplying the base revenue times 105%.<sup>112</sup> This measure was to be applied retroactively to January 1, 2009.<sup>113</sup>

The GA amended IC 6-6-5.5-19 to provide that as of January 1, 2009, the CVET distribution will be based on the amount of tax collected during the previous fiscal year multiplied by a taxing unit’s percentage.<sup>114</sup> Furthermore, the

---

103. *Id.* at 2565-68.

104. *Id.* at 2565.

105. *Id.* at 2571.

106. *Id.*

107. *See id.*

108. *Id.*

109. *Id.* at 2574.

110. *Id.*

111. *Id.* at 2578.

112. *Id.* at 2579.

113. *Id.*

114. *Id.* at 2581.

GA amended IC 6-6-5.5-20 to provide that, as of January 1, 2009, a county's CVET distribution will be the county's distribution percentage multiplied by the amount of CVET deposited in the CVET fund in the preceding calendar year.<sup>115</sup>

### *I. Aircraft Excise Tax*

The GA amended IC 6-6-6.5-23 to require an airport owner to report all aircraft based at an airport.<sup>116</sup> Failure to include an aircraft in the report will result in a civil penalty of \$100 for each aircraft that an airport owner fails to report.<sup>117</sup>

### *J. Cigarette Tax*

The GA amended IC 6-7-1-28.1 to change the distribution of the cigarette tax so that 5.74% goes to the state retiree health benefit trust fund and eliminates the amount used to reimburse the general fund for the tax credit for employer-provided health benefit plans.<sup>118</sup> The legislature also amended this statute to increase the percentage of cigarette tax going to the general fund from 53.68% to 54.5%.<sup>119</sup>

### *K. Tax Administration*

To administer more effectively the various tax provisions of the Indiana Code, the GA amended a number of statutes.

The GA amended IC 6-8.1-3-4 to provide that the reporting of information in an electronic format is included in the Department's authority when furnishing forms used in administering the various taxes.<sup>120</sup>

The GA also granted the Department the power to use statistical sampling when auditing taxpayers.<sup>121</sup> Both the taxpayer and the Department must agree on the sampling method.<sup>122</sup>

The GA amended IC 6-8.1-3-16 to require the Department to compile a list of retail merchants whose certificate has not been renewed or whose registration has been revoked by the Department.<sup>123</sup> The list must be published on the Department's Web site.<sup>124</sup>

The GA codified a previously non-code provision concerning Indiana's

---

115. *Id.* at 2582.

116. *Id.* at 2587-88.

117. *Id.*

118. *Id.* at 2591-92.

119. *Id.*

120. *Id.* at 2593.

121. *Id.* at 2593-94.

122. *Id.*

123. *Id.* at 2596-97.

124. *Id.* at 2597.



membership in the Multistate Tax Commission.<sup>125</sup>

The GA also enacted new legislation requiring the Department cooperate with the Department of Labor, the Worker's Compensation Board, and the Department of Workforce Development concerning suspected improper classification of an individual as an independent contractor by a contractor.<sup>126</sup> The sharing of information must begin after December 31, 2009, and the information shared between the agencies must remain confidential.<sup>127</sup>

The GA amended IC 6-8.1-5-2 to allow an erroneously issued refund check from the Department to be recovered through the assessment procedures of the Department.<sup>128</sup> In order to do so, the assessment must be issued within two years of the refund or within five years if the refund was obtained through fraud or misrepresentation by the taxpayer.<sup>129</sup>

The GA amended IC 6-8.1-6-4.5 to require the rounding to the nearest dollar on an income tax return.<sup>130</sup>

The GA enacted legislation to require the DLGF, the budget agency, and the Department to determine the amount of adjusted gross income and the number of taxpayers that reside in a city or town.<sup>131</sup> The reporting is required to begin January 1, 2011.<sup>132</sup>

The GA amended IC 6-8.1-7-1 to provide that the Department's confidentiality statute does not apply to the release of information concerning the beer excise tax, including brand and package type information.<sup>133</sup>

The GA enacted new legislation to allow the Department to require a person on a payment plan for sales and withholding taxes to make periodic payments by electronic funds transfer.<sup>134</sup> The electronic funds transfer may be made through an automatic withdrawal from the person's account at a financial institution.<sup>135</sup>

The GA amended IC 6-8.1-9-2 to provide a credit over the next ten years for income tax paid by nonresident shareholders during tax years 2005 through 2008.<sup>136</sup> The credit will be applied against future liabilities of the taxpayer.<sup>137</sup> The statute also requires the taxpayer to prove under a penalty of perjury that they have reported income to their home state equal to the income attributable to the amount of credit or refund granted.<sup>138</sup>

---

125. *Id.* at 249.

126. *Id.* at 1714.

127. *Id.* at 1713.

128. *Id.* at 2598.

129. *Id.*

130. *Id.* at 2599.

131. *Id.*

132. *Id.*

133. *Id.* at 2602.

134. *Id.* at 2603.

135. *Id.*

136. *Id.* at 2605-06.

137. *Id.* at 2605.

138. *Id.* at 2606.

The GA amended IC 6-8.1-10-2.1 in order to clarify that a partnership or trust that fails to withhold on nonresident shareholders will be subject to a penalty of twenty percent.<sup>139</sup> This language already existed for an S corporation.<sup>140</sup>

Finally, the GA amended IC 6-8.1-10-5 to allow the Department to require all future payments of a taxpayer to be remitted with guaranteed funds if the person is assessed a 100% bad check penalty and the Department cannot collect in full.<sup>141</sup>

#### *L. Innkeepers' and Food and Beverage Taxes*

In order to assist Marion County in paying for its sports facilities and convention center, the GA amended IC 6-9-8-3 to authorize Marion County to increase the innkeepers' tax by one percent and deposit the increased revenue into the sports and convention facilities operating fund.<sup>142</sup> The GA also amended IC 6-9-13-2 to authorize Marion County to increase the admissions tax by four percent, but only between January 1, 2013, and March 1, 2013.<sup>143</sup> Marion County is authorized to deposit the increased revenue into the sports and convention facilities operating fund.<sup>144</sup>

The GA enacted IC 6-9-41 in order to allow Monroe County to adopt an ordinance imposing a one percent food and beverage tax.<sup>145</sup> The tax could take effect January 1, 2010, if an ordinance was adopted before December 1, 2009.<sup>146</sup> The county auditor must distribute the funds to the city or county from which they were collected.<sup>147</sup>

The GA also added IC 6-9-42 in order to allow a city to impose a youth sports complex admissions tax of five percent to be used for funding infrastructure costs and payment of principal and interest on bonds issued by the city to finance infrastructure improvements.<sup>148</sup> The tax is to be collected by the city imposing the tax.<sup>149</sup>

#### *M. Other Provisions*

The GA also passed a number of other provisions affecting various aspects of tax policy. For instance, the GA enacted IC 8-24, which authorizes a regional transportation district income tax in LaPorte, Porter, Lake, and St. Joseph

---

139. *Id.* at 2608.

140. *Id.*

141. *Id.* at 2609.

142. *Id.* at 2610-11.

143. *Id.* at 2611.

144. *Id.* at 2612.

145. *Id.* at 1882.

146. *Id.*

147. *Id.* at 1885.

148. *Id.* at 2612-16.

149. *Id.* at 2613-14.



counties.<sup>150</sup> This tax is not to exceed 0.25%.<sup>151</sup>

The GA also enacted IC 20-51 to allow for the creation of a school scholarship program that awards scholarships to students.<sup>152</sup> The statute also provides for a tax credit when contributions are made to a scholarship-granting organization.<sup>153</sup> A non-code provision included in this legislation authorized the Department to adopt emergency rules to implement the school scholarship program provided for under IC 20-51.<sup>154</sup>

The GA also enacted a new statute that limits the maximum allocation to the Allen County professional sports development area to \$3 million per year instead of \$5 per person in the county.<sup>155</sup>

In order to assist Marion County in paying for its sports facilities and convention center, the GA amended IC 36-7-31-6 to provide that an expansion of the Marion County Professional Sports Development Area will only include revenue from the sales tax, adjusted gross income tax, and county option income tax.<sup>156</sup> The expanded area must be within the boundary of Illinois Street, Maryland Street, and Washington Street, and includes hotels, motels, or a multi-brand complex.<sup>157</sup> Tax revenue from the expanded area must be deposited into the sports and convention facilities operating fund.<sup>158</sup>

The GA amended IC 36-7-31.3-10 to require that for taxes attributable to a professional sports and convention development area the first \$2.6 million must be transferred to the county treasurer for deposit in the supplemental coliseum improvement fund.<sup>159</sup> Any remaining funds shall be deposited into the joint county-city capital improvement board in the county.<sup>160</sup>

The GA also passed several non-code provisions including one that removes the requirement that the Department assist in administering the quality assessment fee on health facilities.<sup>161</sup> This provision is retroactive to October 1, 2008.<sup>162</sup> Another non-code provision required the Department to conduct a study of the feasibility of changing the design and method for verifying, tracking, and tracing cigarette stamps, and report the findings to the Legislative Services Agency by November 1, 2009.<sup>163</sup> Finally, the GA enacted a non-code provision that provides that a city or town that made estimated gross income tax payments

---

150. *Id.* at 2639-73.

151. *Id.* at 2666.

152. *Id.* at 2724-28.

153. *Id.*

154. *Id.* at 2870.

155. *Id.* at 1888-89.

156. *Id.* at 2802-03.

157. *Id.* at 2803.

158. *Id.* at 2810.

159. *Id.* at 2891.

160. *Id.*

161. *See id.* at 2865.

162. *Id.*

163. *Id.* at 2877.





and that “the presence of environmental contamination” justified a reduction in value.<sup>176</sup> During the hearing before the IBTR, U. S. Steel presented two means of quantifying the amount of obsolescence it believed was present in its property. The first comprised of three separate parts: part one used a “change-in-pricing” method, part two used an “excess operating cost” method, and part three utilized a “business enterprise value” method.<sup>177</sup> U. S. Steel’s second “obsolescence calculation quantified the total amount of obsolescence present in its property . . . by comparing the property’s market value as determined by the Marshall & Swift cost approach with its market value as determined by a sales comparison approach.”<sup>178</sup> For its land, U. S. Steel “presented evidence demonstrating that the portion of the Grand Calumet River running through its property was environmentally contaminated as of the assessment date and what it subsequently spent to remediate that contamination.”<sup>179</sup> The IBTR found that U. S. Steel “had prima facie demonstrated that its improvements were entitled to both functional and economic obsolescence adjustments, as it had both identified the causes of obsolescence from which its property suffered and then quantified the amount of obsolescence present using generally accepted appraisal techniques.”<sup>180</sup> The IBTR also found that U. S. Steel “had prima facie demonstrated that its land was entitled to a reduction in value—equivalent to the amount it spent in its remediation efforts—to account for the environmental contamination.”<sup>181</sup>

Lake County appealed to the Tax Court alleging five issues. The first issue was whether the IBTR erred when it admitted U. S. Steel’s Excess Cost Report because it was not “scientifically reliable.”<sup>182</sup> The second issue was whether the IBTR “erred when it failed to discount U. S. Steel’s total functional obsolescence award.”<sup>183</sup> The third issue was whether the IBTR erred when it failed to find that the sales comparison approach “was invalid because it utilized bankruptcy sales in” reaching a conclusion.<sup>184</sup> The fourth issue was whether the IBTR “erred when it held that U. S. Steel was entitled to an obsolescence adjustment at all, given the result of “the business enterprise value” calculation.<sup>185</sup> Lake County lastly challenged whether the IBTR erred in reducing the assessed value of U. S. Steel’s land.<sup>186</sup>

As to the first issue, the court held that “generally recognized appraisal techniques are acceptable methods by which to quantify obsolescence in Indiana’s pre-2002 assessment system,” and the method utilized by U. S. Steel

---

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 87-88.

183. *Id.* at 88.

184. *Id.*

185. *Id.*

186. *Id.*

was a generally recognized appraisal technique for calculating functional obsolescence.<sup>187</sup> As to the second issue, the court found that the IBTR erred in determining that the stipulated value of improvements represented the improvements' value before any reduction for obsolescence.<sup>188</sup> As to the third issue, the court held that the IBTR did not abuse its discretion in allowing U. S. Steel to use bankruptcy sales in determining the market value of its own property.<sup>189</sup> As to the fourth issue, the court found that the IBTR did not abuse its discretion with regard to its finding that U. S. Steel had *prima facie* demonstrated the existence of economic obsolescence of its property using a generally recognized appraisal technique.<sup>190</sup> As to the final issue, the court held that U. S. Steel failed to make a *prima facie* case that it was entitled to a negative influence factor simply based on the amount of funds U. S. Steel had expended in an attempt to remediate the environmental contamination.<sup>191</sup>

2. *Rohrman v. Tippecanoe County Assessor*.<sup>192</sup>—IBSTR issued a final determination affirming the Tippecanoe County PTABOA's valuation of several parcels of his land as of the March 1, 2004 and 2005 assessment dates.<sup>193</sup> Robert V. Rohrman appealed.<sup>194</sup> Rohrman named the Fairfield Township Assessor as the respondent.<sup>195</sup> Eleven days later, after the forty-five-day appeal period had expired, Rohrman filed an amended petition solely to change the respondent from the Fairfield Township Assessor to the Tippecanoe County Assessor.<sup>196</sup> The Assessor filed a timely appearance, answer, and a motion to dismiss the appeal.<sup>197</sup> The Assessor sought to have Rohrman's appeal dismissed because it invoked neither the court's subject matter jurisdiction nor personal jurisdiction.<sup>198</sup> The Assessor argued that Rohrman failed to properly name her as the respondent and serve her within forty-five days from the date of the IBTR's final determination.<sup>199</sup> The court held that Rohrman's failure to name the Assessor in his original petition was "not the type of error that implicates [the] Court's subject matter jurisdiction."<sup>200</sup> Rather, it was a procedural error that could prevents the court "from *exercising* its jurisdiction."<sup>201</sup> Furthermore, the court found that although the general rule required that a new defendant to a claim be

---

187. *Id.* at 89.

188. *Id.* at 91.

189. *Id.* at 92.

190. *Id.* at 93.

191. *Id.* at 94.

192. 901 N.E.2d 95 (Ind. T.C. 2009).

193. *Id.* at 96.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 96-97.

198. *Id.* at 97.

199. *Id.*

200. *Id.*

201. *Id.*



added before the running of the statute of limitations, Trial Rule 15(C) provided an exception and Rohrman had met the requirements of that exception.<sup>202</sup>

3. *Coombes v. Washington Township Assessor*.<sup>203</sup>—Todd and Dawn Coombes challenged the final determination of the IBTR regarding the value of their real property as of the March 1, 2003 assessment date.<sup>204</sup> The controversy arose because sometime after the March 1, 2002 general reassessment. Vacant rural land just southeast of the intersection of 161st Street and Carey Road in Carmel, Indiana, a new subdivision—the Bridgewater Club—was platted.<sup>205</sup> In January 2003, the Coombeses purchased a 2.3-acre lot in Bridgewater for \$695,000. For the March 1, 2003 assessment, the Washington Township Assessor assigned the lot \$627,000 assessed value. The Coombeses subsequently filed an appeal with the Hamilton County PTABOA, claiming that the assessment should be \$150,000.<sup>206</sup> The PTABOA affirmed the original assessment. Coombes then filed an appeal with the IBTR claiming that the “assessment should be ‘no more than’ \$207,000.”<sup>207</sup>

The IBTR conducted a hearing during which the Coombeses made two new arguments. First, they claimed that the lot should have been assessed at \$42,000.<sup>208</sup> In the alternative, they claimed that their lot should have been assessed at \$513,663 due to the application of a trending factor.<sup>209</sup> The IBTR issued a final determination in which it held that the assessed value of the land in question should have been \$598,000.<sup>210</sup> Furthermore, the IBTR agreed with the Coombeses “in that the application of a trending factor to the \$695,000 contract price was the best method to determine the land’s January 1, 1999 market value-in-use.”<sup>211</sup> The Coombeses timely filed an appeal to the Tax Court.

On appeal, the Coombeses presented only one issue, arguing that the IBTR’s final determination was erroneous because the IBTR failed to recognize that, in assessing the lot, local assessing officials violated the Coombeses’ procedural due process rights.<sup>212</sup> Specifically, the Coombeses argued that in 2002 (before the Coombeses purchased the land), “the applicable 2002 neighborhood valuation form provided that unplatted, vacant rural land located just southeast of the intersection of 161st Street and Carey Road in Carmel, Indiana was to be assessed at \$35,000 for the first acre and \$5,300 per acre beyond that.”<sup>213</sup> The Coombeses also argued that local assessing officials were required to amend the

---

202. *Id.* at 97-98.

203. 901 N.E.2d 1180 (Ind. T.C. 2009).

204. *Id.* at 1180.

205. *Id.* at 1180-81.

206. *Id.* at 1181.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 1182.

213. *Id.*

values set forth in the 2002 neighborhood valuation form if officials believed some other value more accurately reflected the 2003 value.<sup>214</sup> The Coombeses further argued that before amending the form, local assessing officials should have first given notice and an opportunity to be heard to affected taxpayers.<sup>215</sup> The court held that the 2002 neighborhood valuation form contained a “catch-all” provision under which Bridgewater and the Coombeses’ lot could be assessed in 2003.<sup>216</sup> Local assessing officials duly promulgated this form, and therefore did not violate the Coombeses’ due process rights.<sup>217</sup>

4. *Curtis v. Calumet Township Assessor*.<sup>218</sup>—Raymond L. Curtis challenged the final determinations of the IBTR upholding the Calumet Township Assessor’s assessments of the two parcels of land in Gary, Indiana, owned by Curtis during the 1998, 1999, and 2000 tax years.<sup>219</sup> The parcels were classified as commercial parking lots. For each of the years at issue, Parcel #1 (referred to in the opinion as parcel 29) was valued at \$21,300, and Parcel #2 (referred to in the opinion as parcel 35) was valued at \$19,200.<sup>220</sup> Curtis filed Petitions for Correction of Error first with the Lake County PTABOA, and then with the IBTR.<sup>221</sup> The IBTR upheld each of the assessments.<sup>222</sup> Curtis then initiated an original appeal with the Tax Court. The parties filed cross-motions for summary judgment based on the sufficiency of the evidence supporting the IBTR’s final determinations.<sup>223</sup>

Curtis presented two arguments in support of reversing the IBTR’s final determinations. First, he argued that his procedural due process rights were violated during the administrative process because the Administrative Law Judge (ALJ) either lost or mishandled some of his evidence, and he was not provided a hearing on the assessment of Parcel #2.<sup>224</sup> Second, he asserted that, contrary to the IBTR’s conclusion, he had *prima facie* established that his parcels had been erroneously assessed.<sup>225</sup>

As to the mishandling of evidence, the court found that all of the evidence that had allegedly been lost or mishandled was contained within the record.<sup>226</sup> As to the failure to hold a hearing on Parcel #2, the court found that the administrative hearing transcript unequivocally indicated that Curtis was

---

214. *Id.*

215. *Id.*

216. *Id.* at 1183.

217. *Id.* at 1183 n.7.

218. No. 71T10-0704-SC-21, 2009 WL 567209 (Ind. T.C. Mar. 5, 2009).

219. *Id.* at \*1.

220. *Id.* at \*2.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at \*3.

226. *Id.* at \*2.



provided an opportunity to challenge the assessment.<sup>227</sup>

As to the second issue, Curtis asserted that the IBTR made a series of errors in affirming his assessments, including: “(1) the assessments were increased without adequate notice; (2) the parcels were improperly classified; (3) the assessments required adjustments to reflect a loss in value caused by inverse condemnation; (4) the assessments included ‘charges’ for improvements located on other parcels; and (5) the assessments contained mathematical errors.”<sup>228</sup> With regard to the adequate notice assertion, the court found substantial evidence based on the record did not support this argument.<sup>229</sup> As to the improper classification of the parcels, the court found that despite the fact Curtis did not use the parcels as commercial parking lots, the Assessor did not err in classifying the parcels as commercial parking lots.<sup>230</sup> As to the loss of value due to inverse condemnation, Curtis argued that both the Assessor and the IBTR failed to recognize that several inverse condemnation tactics caused his parcels to be worthless.<sup>231</sup> But the court found that a taxpayer who seeks to have an influence factor applied to his land must submit probative evidence as to the land’s deviation from the norm during the administrative hearing.<sup>232</sup> Curtis failed to provide such evidence.<sup>233</sup> As to the excess charges for improvements, the court found that Curtis failed to produce *prima facie* establish that his assessments were improper for this reason.<sup>234</sup> The property record cards for the two parcels were not included within the record, and the court could therefore not determine whether or not the assessments actually included charges for improvements.<sup>235</sup> Finally, as to Curtis’s assertion that a mathematical error rendered the assessments on the two parcels to be invalid, the court found no mathematical error after reviewing the record.<sup>236</sup> Based on the court’s findings, Curtis’s motion for summary judgment was denied, and the Assessor’s cross-motion for summary judgment was granted.<sup>237</sup>

5. *M.D. Curtis Management Co. v. Indiana Board of Tax Review*.<sup>238</sup>—*M.D. Curtis Management Co.* appealed the final determination of the IBTR with regard to the assessments of Curtis Management’s real property for the 2001, 2002, and 2003 tax years.<sup>239</sup> During the tax years at issue, Curtis Management owned a

---

227. *Id.* at \*3.

228. *Id.*

229. *Id.* at \*4.

230. *Id.*

231. *Id.*

232. *Id.* at \*5.

233. *Id.*

234. *Id.* at \*6.

235. *Id.*

236. *Id.*

237. *Id.*

238. No. 45T10-0707-SC-39, 2009 WL 580396 (Ind. T.C. Mar. 5, 2009).

239. *Id.* at \*1.

parcel of land located on Indianapolis Boulevard in East Chicago, Indiana.<sup>240</sup> Before September 13, 2001, a building on the parcel contained both general retail space and apartment units.<sup>241</sup> On September 13, 2001, a fire severely damaged the building.<sup>242</sup> For the 2001 tax year, the assessed value of Curtis Management's real property was \$7,270, but for both the 2002 and 2003 tax years Curtis Management's land was assessed at \$33,700.<sup>243</sup> Curtis Management challenged the assessed values by filing Petitions for Correction of Error, first with the Lake County PTABOA, and then with the IBTR.<sup>244</sup> The IBTR held a hearing on Curtis Management's Petition, but neither the Lake County Assessor nor anyone one representing the Assessor appeared at the hearing.<sup>245</sup> Throughout the hearing, Curtis Management argued that its assessments should be adjusted to reflect its "property's loss in value due to both the presence of obsolescence in his building and the various abnormalities that had impacted his land."<sup>246</sup> The IBTR timely issued its final determination in which it concluded that Curtis Management "failed to demonstrate that his building was entitled to an obsolescence adjustment or that his land was entitled to an influence factor adjustment."<sup>247</sup>

On appeal to the Tax Court, the court identified two major issues: whether or not Curtis Management's procedural due process rights were violated during the administrative process; and whether or not the IBTR improperly made its final determination.<sup>248</sup> On the issue of whether or not Curtis Management's due process rights were violated, Curtis Management claimed that the ALJ "who conducted the administrative hearing imposed an unreasonable time restraint on the hearing," and that the IBTR did not "submit or transcribe the audio tape recordings" admitted into evidence during the administrative hearing.<sup>249</sup> But the court found that Curtis Management was the only party that appeared for the administrative hearing and that the ALJ had provided more than enough time for Curtis Management to present its case.<sup>250</sup> Furthermore, the court found that the IBTR did not have a duty to transcribe the audiotapes that were submitted into evidence.<sup>251</sup> Whether or not the IBTR's final determination was improper, the court found that the evidence presented by Curtis Management was insufficient to demonstrate that the parcel in question should have received an obsolescence

---

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at \*2-3.

249. *Id.* at \*2.

250. *Id.*

251. *Id.*



adjustment or that it should have received an influence factor adjustment.<sup>252</sup> More specifically, the court found that Curtis Management needed to demonstrate that there was a specific link between the “property’s actual loss of value and the causes of obsolescence and negative influences.”<sup>253</sup>

6. *Kooshtard Property VIII, LLC v. Shelby County Assessor*.<sup>254</sup>—Kooshtard Property VIII, LLC appealed the final determination of the IBTR which affirmed the 2002 assessment of its real property.<sup>255</sup> Kooshtard owned 8.97 acres of land along State Road 44 in Shelbyville, Indiana.<sup>256</sup> In March 2002, Kooshtard’s land was assigned an assessed value of \$1,047,000.<sup>257</sup> In arriving at this assessed value, the Addison Township Assessor designated one acre as “primary” giving it a base rate value of \$250,000; the remaining 7.97 acres were designated “undeveloped usable” with a base rate of \$200,000 per acre.<sup>258</sup> In addition, the Assessor assigned the undeveloped but usable acreage a fifty percent negative influence factor.<sup>259</sup> Kooshtard assumed that the negative influence factor was to account for the land’s unique size and shape.<sup>260</sup> Kooshtard challenged the assessment with the Shelby County PTABOA, arguing that the land’s assessed value should be reduced to account for the fact that a power line easement encumbered the land.<sup>261</sup> The PTABOA rejected this argument, and Kooshtard appealed its assessment to the IBTR.<sup>262</sup> The IBTR conducted an administrative hearing on Kooshtard’s appeal in a timely manner.<sup>263</sup> Kooshtard argued to the IBTR that its land was entitled to two separate negative influence factors of fifty percent: one for its land’s size and shape, and the other for the power line easement.<sup>264</sup> The IBTR rejected Kooshtard’s argument.<sup>265</sup> On appeal to the Tax Court, Kooshtard presented one issue: whether or not the IBTR erred in affirming the application of only one negative influence factor of fifty percent to Kooshtard’s land.<sup>266</sup>

On appeal, Kooshtard argued that the IBTR, in affirming the application of one negative influence factor of fifty percent, ignored the fact that local assessing officials actually approved the application of two negative influence factors of

---

252. *Id.* at \*4.

253. *Id.*

254. 902 N.E.2d 913 (Ind. T.C. 2009).

255. *Id.* at 913.

256. *Id.* at 914.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

fifty percent.<sup>267</sup> The court found the administrative record clear on the point that the negative influence factor adjustment was actually based on the power line encumbrance.<sup>268</sup> Furthermore, the court found that Kooshtard failed to establish a direct link between the unique size and shape of the parcel and a reduction in its value.<sup>269</sup> Based on these findings, the court held that the IBTR did not err when it held that Kooshtard was not entitled to a second negative influence factor of fifty percent due to the land's size and shape.<sup>270</sup>

7. *Barker v. Johnson County Assessor*.<sup>271</sup>—Susan Barker challenged the final determination of the IBTR with regard to the assessment of her real property for the 2002 tax year.<sup>272</sup> The property in question was located on U.S. Highway 31 in Edinburgh, Indiana, and included four industrial warehouse buildings.<sup>273</sup> For the 2002 tax year, the Johnson County Assessor valued one of the warehouses using the General Commercial Industrial light warehouse model for valuing improvements and assigned it a D-1 grade.<sup>274</sup> Barker appealed this assessment to the Johnson County PTABOA and later to the IBTR.<sup>275</sup> She argued that her warehouse should have been assessed using the General Commercial Kit (GCK) model.<sup>276</sup> The IBTR issued a final determination in which it agreed with Barker that the warehouse should have been assessed using the GCK model and ordered a reassessment.<sup>277</sup> On remand, the Assessor assessed the warehouse using the GCK model and changed the grade from D-1 to C.<sup>278</sup> Barker believed the reassessment was still too high, and again appealed to the PTABOA and then to the IBTR.<sup>279</sup> After hearing evidence on this second appeal, the IBTR determined that Barker did not present sufficient evidence to establish that the reassessment had been incorrect.<sup>280</sup> Barker filed an original appeal with the Tax Court asserting that the IBTR erred when it determined that she did not present probative evidence to *prima facie* establish that her assessment was incorrect.<sup>281</sup>

The court considered the evidence presented by Barker to the IBTR regarding the difference between the assessed value of the warehouse in question and its

---

267. *Id.* at 915.

268. *Id.*

269. *Id.* at 916.

270. *Id.*

271. No. 49T10-0711-TA-68, 2009 Ind. Tax LEXIS 9 (Ind. T.C. Apr. 22, 2009).

272. *Id.* at \*1.

273. *Id.*

274. *Id.* at \*1-2.

275. *Id.* at \*2.

276. *Id.*

277. *Id.*

278. *Id.* at \*3.

279. *Id.* at \*3-4.

280. *Id.* at \*4.

281. *Id.*



fair market value-in-use.<sup>282</sup> The court found that Barker had provided sufficient evidence as to why her property was comparable to other similar properties.<sup>283</sup> The court also found that t"he assessed value of the office portion of Barker's warehouse was never in dispute," and therefore it was not necessary for Barker to provide evidence as to the value of the office portion of her building.<sup>284</sup> Based on these finding, the court held that Barker had prima facie established that the replacement cost new of the warehouse as calculated by the Assessor was incorrect.<sup>285</sup> The Assessor also failed to offer any evidence to rebut Barker's prima facie case.<sup>286</sup> But the court held that although Barker had demonstrated that the assessment was incorrect, she had not provided sufficient evidence with regard to the grade of the warehouse and therefore was not entitled to the additional depreciation that would accompany a grade change.<sup>287</sup>

8. *St. George Serbian Orthodox Church v. Lake County Property Tax Assessment Board of Appeals*.<sup>288</sup>—*St. George Serbian Orthodox Church* challenged the final determination of the IBTR regarding its denial of a property tax exemption for the 2001 and 2002 tax years.<sup>289</sup> In 2000, *St. George*, an Indiana not-for-profit corporation, applied for and received a property tax exemption on its property in Schererville, Indiana.<sup>290</sup> *St. George's* property consisted of its church, a priest's residence, a garage, a community hall, and the 73.2 acres of land upon which those improvements stood.<sup>291</sup> In 2001, *St. George* built a 39,000 square foot cultural center.<sup>292</sup> In 2003, *St. George* filed two applications with the Lake County PTABOA seeking a religious purposes exemption on the cultural center for the 2001 and 2002 tax years.<sup>293</sup> The PTABOA denied both applications asserting that they had not been timely filed.<sup>294</sup> *St. George* subsequently appealed to the IBTR.<sup>295</sup> *St. George* presented two arguments to the IBTR in support of its position that it should retain its tax-exempt status.<sup>296</sup> First, it claimed that because its property had received a full exemption in 2000, it was not required to file another exemption application until 2002 pursuant to IC 6-1.1-11-3.5(a).<sup>297</sup> In the alternative, *St. George* argued that

---

282. *Id.* at \*6-14.

283. *Id.* at \*11.

284. *Id.*

285. *Id.* at \*12.

286. *Id.*

287. *Id.* at \*13-14.

288. 905 N.E.2d 539 (Ind. T.C. 2009).

289. *Id.* at 540.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

its due process rights had been violated because it had not been properly notified of the increase in its assessment resulting from the newly constructed cultural center.<sup>298</sup> The IBTR ultimately upheld PTABOA's decision.<sup>299</sup> In doing so, the IBTR explained that the exemption St. George had in place for the 2000 tax year did not cover the newly constructed building and St. George was therefore required to file exemption applications for the 2001 and 2002 tax years.<sup>300</sup> In addition, the IBTR found that St. George had received sufficient notice of the tax assessment.<sup>301</sup> St. George filed an appeal with the Tax Court challenging the decision that St. George's cultural center was not entitled to the religious purposes exemption for the 2001 and 2002 tax years.<sup>302</sup> In support of this position, St. George argued that the recent enactment of a "retroactive amendment to Indiana Code § 6-1.1-11-3," meant that its exemption applications for the 2001 and 2002 tax years were timely filed.<sup>303</sup> The court held that this non-code section provided clear evidence that the legislature intended to allow taxpayers until January 1, 2008, to file their exemption applications for the tax years after 2000.<sup>304</sup>

9. *Lake County Property Tax Assessment Board of Appeals v. St. George Serbian Orthodox Church*.<sup>305</sup>—The Lake County PTABOA challenged the final determination of the IBTR that granted St. George Serbian Orthodox Church ("St. George") a property tax exemption for the 2003 tax year.<sup>306</sup> St. George is an Indiana not-for-profit corporation that owns and operates a "Church-School Congregation" (Parish) in Schererville, Indiana.<sup>307</sup> St. George's property consisted of its church, a priest's residence, a garage, a community hall, a cultural center, and the 73.2 acres of land upon which those improvements stood.<sup>308</sup> Much like *St. George Serbian Orthodox Church v. Lake County Property Tax Assessment Board of Appeals*,<sup>309</sup> which was decided by the Tax Court on the same day, this case involved the 39,000 square foot cultural center that contained church administration offices, conference rooms, and a banquet facility.<sup>310</sup> St. George used the cultural center for church events, but the banquet facility was available to the public for rent.<sup>311</sup> In March 2003, St. George filed an application with the PTABOA requesting a religious purposes exemption on

---

298. *Id.*

299. *Id.* at 541.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.* at 542.

305. 905 N.E.2d 536 (Ind. T.C. 2009).

306. *Id.* at 536.

307. *Id.* at 537.

308. *Id.*

309. 905 N.E.2d 539 (Ind. T.C. 2009); *see supra* notes 288-304.

310. *See St. George*, 905 N.E.2d at 537.

311. *Id.*



the cultural center for the 2003 tax year.<sup>312</sup> In August 2006, the PTABOA denied St. George's application because it believed the cultural center was predominantly used as a commercial banquet hall.<sup>313</sup> St. George timely filed a Petition for Review with the IBTR.<sup>314</sup> After conducting a hearing, the IBTR reversed the PTABOA and held that St. George's cultural center was entitled to the requested exemption.<sup>315</sup>

The PTABOA filed an appeal with the Tax Court arguing that the IBTR erred when it determined that St. George *prima facie* demonstrated that its cultural center qualified for the religious purposes exemption as provided in IC 6-1.1-10-16.<sup>316</sup>

In its decision, the court noted that the taxpayer bears the burden of proving that it is entitled to the exemption it seeks and that the IBTR had held that St. George met this burden.<sup>317</sup> The court also noted that the PTABOA had failed to rebut this evidence during the administrative hearing.<sup>318</sup> The court found that PTABOA was essentially challenging the nature of the evidence submitted by St. George during the administrative hearing.<sup>319</sup> But the PTABOA failed to demonstrate to the court that there was probative evidence in the administrative record that affirmatively demonstrated that St. George did not predominately use its cultural center for religious purposes.<sup>320</sup> The PTABOA did not meet its burden, and therefore the court affirmed the decision of the IBTR.<sup>321</sup>

10. *Charwood LLC v. Bartholomew County Assessor*.<sup>322</sup>—Charwood LLC challenged the IBTR final determinations that upheld the Bartholomew County PTABOA interim reassessments of their real property for the 2003 tax year.<sup>323</sup> Charwood owned twenty-seven parcels of land and numerous improvements in Columbus Township, Bartholomew County, Indiana.<sup>324</sup> Sometime after they received their property tax bills for the 2002 assessment year, each of the Petitioners received a letter explaining that the PTABOA would be reviewing the assessed values of the properties and that Charwood was welcome to send a representative to discuss the assessments.<sup>325</sup> Charwood's representative, Milo E. Smith, appeared at this hearing and presented several exhibits in support of each

---

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.* at 538.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* at 539.

321. *Id.*

322. 906 N.E.2d 946 (Ind. T.C. 2009).

323. *Id.* at 947.

324. *Id.*

325. *Id.*

of the properties' 2002 assessed values.<sup>326</sup> Soon thereafter, the PTABOA issued Notifications of Final Assessment Determinations that effectively increasing the assessed values of the Petitioners' properties for the 2003 tax year.<sup>327</sup> Charwood timely filed a Petition for Review with the IBTR.<sup>328</sup> During their final pre-hearing conference, the parties agreed that the matter could be resolved based on their stipulated facts and briefs.<sup>329</sup> As such, the IBTR's ALJ vacated the previously scheduled administrative hearing and instead instituted a briefing schedule.<sup>330</sup> In their brief, Charwood, relying on IC 6-1.1-4-25 and 6-1.1-9-1, claimed that each of their properties' 2002 assessed values should have remained unaltered because none of their properties had experienced a physical change or a change in use between the 2002 and the 2003 tax years.<sup>331</sup> Specifically, they argued that the two statutes authorized interim reassessments only in instances where a property had either been physically altered or put to a different use.<sup>332</sup> The IBTR upheld the interim reassessments, finding that the "plain language of Indiana Code § 6-1.1-4-25 involved an assessor's recordkeeping duties only, [and] did not limit or condition the PTABOA's interim reassessment authority to intermittent property changes."<sup>333</sup> The IBTR also determined that IC 6-1.1-9-1 authorized the PTABOA to reassess undervalued property in any year where the PTABOA believed that property had become undervalued.<sup>334</sup> Charwood filed an appeal with the Tax Court arguing that the PTABOA's 2003 interim reassessments were not authorized under IC 6-1.1-9-1.<sup>335</sup>

In rendering a decision, the court looked first to the plain language of IC 6-1.1-9-1, which provided:

If a township assessor . . . , county assessor, or county property tax assessment board of appeals believes that any taxable tangible property has been omitted from or undervalued on the assessment rolls or the tax duplicate for any year or years, the official or board shall give written notice under . . . IC 6-1.1-4-22 of the assessment or increase in assessment.<sup>336</sup>

The court held that the statute did not limit an assessing official to only reassessing real property between general reassessments when the property had been physically changed or put to a different use.<sup>337</sup> Rather, the court held that

---

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.* at 948.

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.* at 949.

335. *Id.*

336. *Id.* (quoting IND. CODE § 6-1.1-9-1 (Supp. 2009)).

337. *Id.* at 949-50.



an assessing official's belief that the subject property has been undervalued constitutes the condition precedent to the execution of an interim reassessment under IC 6-1.1-9-1, and, within the context of IC 6-1.1-9-1, undervalued property could have resulted from factors unrelated to physical changes or changes in the use of the property.<sup>338</sup> The court cited several cases, including *Damon Corp. v. State Board of Tax Commissioners*,<sup>339</sup> which recognized assessing officials' interim reassessment authority under IC 6-1.1-9-1.<sup>340</sup> Finally, the court held that Charwood's claim that IC 6-1.1-9-1 and 6-1.1-4-25 were in conflict was misplaced.<sup>341</sup> Because the assessed value of real property in Indiana prior to 2002 bore no relation to any external, objectively verifiable standard of measure, but after 2002 real property assessment in Indiana included such external verifiable data, the court reasoned that Charwood's properties could have been undervalued as of the 2003 tax year despite the fact that none of their properties had been physically changed or put to a new use after the 2002 tax year.<sup>342</sup> Therefore, the court concluded that the IBTR's final determinations were proper.

11. *White v. Greene County Assessor*.<sup>343</sup>—Leonard White challenged the final determination of the IBTR upholding the assessment of his Greene County, Indiana real property by the Beech Creek Township Assessor for the March 1, 2006 assessment date. To determine the value of White's 91.22 acres of land, "the Assessor classified the land as 'commercial' because he believed the property was being used as a mobile home park."<sup>344</sup> White subsequently challenged the assessment of his land with the Greene County PTABOA. The PTABOA denied White's request for relief. White then filed a timely appeal with the IBTR. At the administrative hearing before the IBTR, White explained that, pursuant to IC 16-41-27-5, which defines a mobile home community, his property was not a mobile home park. White also presented the testimony of an expert witness who explained that the condition of any mobile homes was such that the land should be assessed as vacant.<sup>345</sup> The IBTR affirmed the assessment. In doing so, the IBTR acknowledged that the Assessor may have misclassified White's land, but "White failed to demonstrate that his assessment was inaccurate despite the misclassification."<sup>346</sup>

White filed a timely appeal with the Tax Court asserting that the IBTR erred in affirming the Assessor's assessment of his land. Specifically, White argued that the IBTR erred when it failed to give the expert testimony presented by White the appropriate weight or credibility.<sup>347</sup> The court noted that a taxpayer

---

338. *Id.* at 950.

339. 738 N.E.2d 1102, 1107 (Ind. T.C. 2000).

340. *Charwood LLC*, 906 N.E.2d at 950.

341. *Id.* at 951.

342. *Id.*

343. No. 84T10-0807-TA-50, 2009 WL 1605808 (Ind. T.C. June 9, 2009).

344. *Id.* at \*1.

345. *Id.*

346. *Id.*

347. *Id.* at \*2.

attempting to rebut the accuracy of an assessment “may present evidence as to its land’s market value-in-use as calculated under the sales comparison approach.”<sup>348</sup> But the court found that White’s expert used sales of vacant properties in and around Greene County despite the fact White’s property is not a single, vacant parcel of land.<sup>349</sup> The court further noted that White had “subdivided and sold the majority of the acreage to numerous people” who used “their individual tracts as either residential homesites or places to locate storage facilities and junk.”<sup>350</sup> Based on these facts, the court found that White’s expert “failed to use comparable properties in estimating the market value-in-use of White’s property” and therefore the IBTR properly upheld the assessment.<sup>351</sup>

12. *Oaken Bucket Partners, LLC v. Hamilton County Property Tax Assessment Board of Appeals*.<sup>352</sup>—Oaken Bucket Partners, LLC, an Indiana limited liability company, challenged the “final determination of the [IBTR] which denied its property tax exemption application for the 2004 tax year.”<sup>353</sup> Oaken Bucket owned a two-story, multi-tenant office building, situated on the northeast corner of I-69 and Hague Road in Fishers, Indiana. For the 2004 tax year, Oaken Bucket leased 28,000 square feet of its building to Heartland Church, Inc.<sup>354</sup> The other portions of the building were initially leased to other for-profit entities. All of the lessees—“under [the] terms of the triple net leases—paid an annual base rent and certain other expenses including property taxes to [Oaken Bucket].”<sup>355</sup> In May 2004, Oaken Bucket timely filed an exemption application with the Hamilton County PTABOA seeking a charitable/religious purposes exemption on the portion of its building leased to Heartland. The PTABOA denied the application based on the belief that Oaken Bucket realized a profit on the leased property.<sup>356</sup> In July 2004, Oaken Bucket filed a Petition for Review of Exemption with the IBTR. At the administrative hearing, Oaken Bucket argued that the Heartland space qualified for a charitable/religious purposes exemption, as it was owned, occupied, and predominately used for charitable/religious purposes. Specifically, “Oaken Bucket claimed that the mere fact that it leased the majority of its building to Heartland demonstrated that it owned the Heartland space for charitable/religious purposes.”<sup>357</sup> A Heartland representative testified “that Heartland: provided two weekly Sunday worship services” and other church-related programs and

---

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. 909 N.E.2d 1129 (Ind. T.C. 2009), *clarified on reh’g*, 914 N.E.2d 868 (Ind. T.C. 2009), *vacated*, 2010 Ind. LEXIS 215 (Ind. Mar. 11, 2010).

353. *Id.* at 1131.

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*



activities.<sup>358</sup> Oaken Bucket further claimed, and the testimony of a Heartland representative supported, that Oaken Bucket charged Heartland below market rent.<sup>359</sup> In response, the PTABOA asserted that Oaken Bucket's ownership and use of the space had little to do with religion or benevolence and more to do with investment/profit-generating purposes based on the terms of the triple net lease.<sup>360</sup> The IBTR timely "issued its final determination in which it concluded that Oaken Bucket had 'failed to prove that it own[ed] and use[d] the Heartland space in a predominately exempt (religious or charitable) manner.'"<sup>361</sup> Specifically, the IBTR found that Oaken Bucket for the most part charged market rent for the Heartland space and therefore "failed to demonstrate that its property was 'owned or used for anything other than investment [purposes].'"<sup>362</sup> Oaken Bucket then initiated a timely appeal to the Tax Court.

On appeal, Oaken Bucket argued that the IBTR erred when it determined that Oaken Bucket's real property was neither owned nor predominately used for religious/charitable purposes during the 2004 tax year. The court noted that the taxpayer bears the burden of establishing that it is entitled to the charitable/religious purposes exemption it seeks and that the taxpayer need not show a unity of ownership, occupancy, and use in order to fulfill that burden.<sup>363</sup> Rather, the court noted, the taxpayer must present probative evidence during the IBTR hearing which demonstrates that its property is owned for exempt purposes, occupied for exempt purposes, and predominately used for exempt purposes.<sup>364</sup> In reaching a conclusion whether or not Oaken Bucket had met this burden, the court addressed three interrelated questions:

(1) whether the [IBTR's] conclusion that Oaken Bucket owned and used the Heartland space for investment purposes only is supported by substantial evidence; (2) whether the [IBTR's] conclusion that Oaken Bucket charged Heartland market rent is supported by substantial evidence; and, if not, (3) whether Oaken Bucket *prima facie* demonstrated that it fulfilled the ownership and use requirements of Indiana Code § 6-1.1-10-16.<sup>365</sup>

As to the first issue, the court noted that the "evaluation of whether property is owned, occupied, and predominately used for an exempt purpose is a fact sensitive inquiry" with "no bright-line tests."<sup>366</sup> The court then found that the PTABOA could only allege that a desire to generate profits drove Oaken Bucket's execution of the Heartland space leases and factual evidence did not

---

358. *Id.* at 1131-32.

359. *Id.* at 1132.

360. *Id.* at 1132-33.

361. *Id.* at 1133.

362. *Id.*

363. *Id.* at 1134.

364. *Id.*

365. *Id.*

366. *Id.*

support these allegations.<sup>367</sup>

As to the second issue, the court found that the evidence on market rent for triple net leases presented by the PTABOA to the IBTR did not rebut Oaken Bucket's prima facie evidence of actual market rent.<sup>368</sup> Therefore, the IBTR's conclusion as to market rent was not supported by substantial evidence.<sup>369</sup> As to the third issue, the court noted that "when a unity of ownership, occupancy, and use is lacking . . . , both entities must demonstrate that they possess their own exempt purposes, but they need not demonstrate that they both directly used the property in furtherance of those purposes."<sup>370</sup> Therefore, the court held that Oaken Bucket's failure to provide the religious activities had no bearing upon the grant of exemption in this case, because Heartland consistently conducted a variety of religious activities within the space.<sup>371</sup> The court further found that "the evidence in the record [did] not indicate that Oaken Bucket's desire to profit was any more predominate than its desire to provide Heartland with an appropriate space through which it could further" its religious mission.<sup>372</sup> Finally, the court held that "Oaken Bucket's charging of below market rent signified that it owned the Heartland space for a charitable purpose" in that it allowed Oaken Bucket to assist Heartland with the furtherance of Heartland's religious purposes.<sup>373</sup> Furthermore, the court held "that Oaken Bucket owned and used the Heartland space in a manner that differed from that of everyday landlords."<sup>374</sup> Based on the court's determination with regard to these three issues, the court reversed the final determination of the IBTR and remanded the case for further proceedings.

13. *Jamestown Homes of Mishawaka, Inc. v. St. Joseph County Assessor*.<sup>375</sup>—Jamestown Homes of Mishawaka, Inc., an Indiana not-for-profit corporation, challenged the final determination of the IBTR, which had denied Jamestown a property tax exemption for the 2005 tax year. Jamestown's stated purpose in its articles of incorporation, was "[t]o provide housing on a mutual ownership basis, in the manner and for the purpose provided in Section 221(d)(3) of Title II of the National Housing Act, as amended."<sup>376</sup> Under Section 221(d)(3), "the federal government insured and subsidized low-interest rate loans to private developers in order to promote the construction of affordable housing for low to moderate-income families."<sup>377</sup> Jamestown used this financing to construct a 160-unit, multi-family apartment complex in Mishawaka, Indiana.

---

367. *Id.* at 1135.

368. *Id.* at 1136.

369. *Id.*

370. *Id.* at 1137.

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.* at 1138.

375. 909 N.E.2d 1138 (Ind. T.C. 2009).

376. *Id.* at 1139.

377. *Id.*



In exchange for receiving the benefits of this program, Jamestown agreed to be subject to several restrictions, including a requirement that the apartments be available for rent “only to those individuals whose annual income was at or below 95% of the area median income” as established by the U.S. Department of Housing and Urban Development (HUD).<sup>378</sup> Jamestown also agreed to charge rents at fixed rates designed to cover the property’s operating costs and debt service only.<sup>379</sup>

In April 2005, “Jamestown filed two Applications For Property Tax Exemption claiming that its land, improvements, and the personal property contained therein were entitled to the charitable purposes exemption provided by Indiana Code § 6-1.1-10-16.”<sup>380</sup> The PTABOA denied the applications. Jamestown timely filed an appeal with the Indiana Board.<sup>381</sup> At the administrative hearing, “Jamestown argued that its property was entitled to the exemption because the provision of ‘safe, decent and affordable housing for persons of lower income who could not otherwise afford such housing’ is a charitable purpose.”<sup>382</sup> In support of its position, Jamestown introduced evidence that the rent it charged was below market rents charged for comparable units.<sup>383</sup> The IBTR ultimately affirmed the PTABOA’s denial of the exemption finding that “while Jamestown rented its apartments to low and moderate-income tenants at below market rents, it was not because of any charitable purpose or intent of its own; rather, it did so as a condition of its agreement with the federal government.”<sup>384</sup> Furthermore, the IBTR found that the mortgage insurance/interest subsidy provided to Jamestown shifted the financial burden of providing the low-cost housing to the federal government, and that “Jamestown had not relieved the government of any burden sufficient to shift Jamestown’s property tax liability to the taxpayers.”<sup>385</sup> Jamestown timely filed an appeal with the Tax Court arguing that the IBTR erred when it determined that Jamestown’s apartment complex did not qualify for the charitable purposes exemption provided in IC 6-1.1-10-16.

On appeal, Jamestown specifically argued that it had met the twin burden of proving that through the property’s use, there was evidence of charitable acts and also that through those charitable acts, a benefit inured to the public sufficient to justify the tax exemption.<sup>386</sup> Specifically, Jamestown argued that by providing affordable housing to moderate and low-income individuals it helped to alleviate the housing shortage that had been previously identified by the federal government, and it provided this affordable housing with no expectation of

---

378. *Id.*

379. *Id.* at 1139-40.

380. *Id.* at 1140.

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.* at 1141.

financial gain and in compliance with the numerous regulations prescribed by HUD.<sup>387</sup> The court found that the issue of “whether housing, owned by a not-for-profit corporation who receives governmental subsidies so that it may rent to moderate/low-income individuals at below market rates, is property used for a charitable purpose—[was] one of first impression in this state.”<sup>388</sup> The court found that the holding in *Mountain View Homes, Inc. v. State Tax Commission*<sup>389</sup> was particularly instructive and persuasive because it was based on a factual situation and exemption provision similar to the issues identified in this case.<sup>390</sup>

In *Mountain View Homes*, the Supreme Court of New Mexico was called upon to decide whether or not property, used by a nonprofit corporation to provide low rent apartments to low-income families, was used for charitable purposes.<sup>391</sup> In holding that the apartments were not eligible for New Mexico’s charitable purposes exemption, the Supreme Court of New Mexico reasoned that although the activity was not undertaken for profit and had beneficial aspects, the property used in an operation such as low-income housing would not have been considered charitable when the New Mexico constitution was adopted.<sup>392</sup> The Supreme Court of New Mexico further reasoned that the tenants were “required to pay for the premises occupied by them with the rentals being fixed so as to return the amount estimated as being necessary to pay out the project.”<sup>393</sup> The Supreme Court of New Mexico found no evidence that the public was relieved of any expense in comparison with the loss of tax revenue.<sup>394</sup>

The Tax Court adopted as its own, the reasoning provided in the New Mexico case. The court found that the administrative record in this case revealed that Jamestown rented “its apartments to moderate and low-income individuals for below market rates.”<sup>395</sup> But the court found no evidence “indicating that Jamestown’s tenants [were] permitted to occupy their apartments when they [were] unable to pay their rent.”<sup>396</sup> Finally, the court found no evidence “that Jamestown ha[d] lessened the burden of government in meeting the need for affordable housing” because the government essentially bore the risk through its mortgage insurance and interest subsidy.<sup>397</sup> Based on this reasoning, the court upheld the holding of the IBTR.

14. *Moffett v. Department of Local Government Finance*.<sup>398</sup>—George M. Moffett (“Moffett”) challenged the final determination of the DLGF regarding

---

387. *Id.* at 1142.

388. *Id.*

389. 427 P.2d 13 (N.M. 1967).

390. *Jamestown Homes*, 909 N.E.2d at 1142-43.

391. *Mountain View Homes*, 427 P.2d at 17.

392. *Id.* at 16.

393. *Id.* at 17.

394. *Id.*

395. *Jamestown Homes*, 909 N.E.2d at 1141.

396. *Id.* at 1144.

397. *Id.*

398. No. 49T10-0810-TA-58, 2009 WL 4884334 (Ind. T.C. Aug. 19, 2009).



the granting of modified approval of the proposed lease rental agreement between the Union-North United School Corporation and the Union-North United School Building Corporation. The School Corporation served a district in north central Indiana which encompasses a portion of both St. Joseph and Marshall Counties.<sup>399</sup> It operated two school buildings, one elementary school and one junior/senior high school. The sixth grade was taught in several portable classrooms adjacent the elementary school since 1999.<sup>400</sup> In 2007, the School Corporation created a committee to help it in developing a construction plan that would best help the current students and the anticipated enrollment growth. After conducting a public hearing, the School Corporation decided to pursue a plan that included renovating the elementary school, constructing a new intermediate school, and renovating the existing high school. The total cost for the proposed project was estimated at about \$20 million.<sup>401</sup> Shortly after approval was granted, opponents of the proposed project initiated a remonstrance process, which ultimately failed.<sup>402</sup> In July 2008, the School Corporation petitioned the DLGF to approve the execution of the lease between the School Corporation and the Building Corporation. The DLGF referred the petition to the School Property Tax Control Board for its recommendation. After a public hearing, the Control Board recommended unanimously that the DLGF approve the lease rental agreement.<sup>403</sup> The DLGF issued a final determination in which it approved a modified lease rental agreement. Moffett timely filed an appeal with the Tax Court arguing that the DLGF was in error.<sup>404</sup>

The court noted that the standard of review for a DLGF final determination regarding a school construction project was abuse of discretion on the part of the DLGF, and the court must rely heavily upon the written findings of the DLGF in support of its final determination.<sup>405</sup> In this case, the court found that the DLGF had failed to make findings of fact and to provide any reasoning of any kind in reaching its decision. Therefore, the court remanded the case back to the DLGF so that it could enter specific findings of fact.<sup>406</sup>

15. *Jamestown Homes of Mishawaka, Inc. v. St. Joseph County Assessor*.<sup>407</sup>—The court previously issued an opinion on this case in *Jamestown I*.<sup>408</sup> In “that opinion, the Court affirmed the [IBTR’s] final determination that held that Jamestown Homes of Mishawaka, Inc. . . . was not entitled to a property

---

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.* at \*2.

405. *Id.* at \*3.

406. *Id.* at \*5.

407. 914 N.E.2d 13 (Ind. T.C. 2009), *trans. denied*, 2010 Ind. LEXIS 234 (Ind. Mar. 11, 2010).

408. See *Jamestown Homes of Mishawaka, Inc. v. St. Joseph County Assessor*, 909 N.E.2d 1138 (Ind. T.C. 2009), *trans. denied*, 2010 Ind. LEXIS 234 (Ind. Mar. 11, 2010).

tax exemption on apartments it leased to low/moderate income individuals for below-market rent.”<sup>409</sup> Jamestown filed a Petition for Rehearing requesting the court reconsider its holding in light of the court’s decision in *Oaken Bucket Partners, LLC v. Hamilton County Property Tax Assessment Board of Appeals*,<sup>410</sup> which was issued on the same day as *Jamestown I*.<sup>411</sup> In *Oaken Bucket*, the court held that the petitioner was entitled to an exemption on property it leased to a church for below-market rent.<sup>412</sup> Based on this holding, Jamestown argued that the holding in *Jamestown I* was irreconcilable due to the similar facts in both cases.<sup>413</sup> In this case, the court distinguished *Oaken Bucket* by noting that “there was no question that the subject property was occupied and used” for exempt purposes.<sup>414</sup> The court further noted that each exemption case is unique and that “the determination that Oaken Bucket’s property was entitled to an exemption was based on all the facts as they were presented in that case.”<sup>415</sup> Jamestown’s property was not entitled to an exemption based on the facts as Jamestown presented them.<sup>416</sup> In its Petition for Rehearing, Jamestown asked the court to remand the case to the IBTR for further review and to address other issues of material facts. The court found that it had committed no error that would require remand to the IBTR.<sup>417</sup> Lastly, Jamestown argued that the court strayed from applying the well-established test for determining “whether property qualifies for a charitable purposes exemption and applied a whole ‘new’ test.”<sup>418</sup> The court disagreed holding that it did not apply a new test but instead demonstrated the insufficiency of the evidence presented by Jamestown in the original administrative hearing.<sup>419</sup>

16. *Oaken Bucket Partners, LLC v. Hamilton County Property Tax Assessment Board*.<sup>420</sup>—The court previously issued an opinion on this case in *Oaken Bucket I*.<sup>421</sup> In that opinion, the court held that “a portion of Oaken Bucket Partners, LLC’s . . . real property qualified for a charitable/religious purposes exemption under Indiana Code § 6-1.1-10-16 during the 2004 tax year.”<sup>422</sup> The Hamilton County PTABOA and the Hamilton County Assessor

---

409. *Jamestown Homes*, 914 N.E.2d at 14.

410. 909 N.E.2d 1129 (Ind. T.C. 2009); see *supra* notes 352-74.

411. *Jamestown Homes*, 914 N.E.2d at 14.

412. *Jamestown Homes*, 909 N.E.2d at 1134.

413. *Jamestown II*, 914 N.E.2d at 14.

414. *Id.* at 14-15.

415. *Id.* at 15.

416. *Id.*

417. *Id.*

418. *Id.* at 16.

419. *Id.*

420. 914 N.E.2d 868 (Ind. T.C. 2009), *trans. granted*, 2010 Ind. LEXIS 215 (Ind. Mar. 11, 2010).

421. See *Oaken Bucket Partners, LLC v. Hamilton County Prop. Tax Assessment Bd. of Appeals*, 909 N.E.2d 1129 (Ind. T.C. 2009).

422. *Oaken Bucket Partners, LLC*, 914 N.E.2d at 869.



filed a Petition for Rehearing arguing that “the court committed reversible error when it failed to find that Oaken Bucket had been prejudiced”; and also “that the court’s decision in *Oaken Bucket I* conflict[ed] with the cases of *Travelers’ Insurance Company v. Kent*<sup>423</sup> and *Spohn v. Stark*, 197 Ind. 299, 150 N.E. 787 (Ind. 1926).”<sup>424</sup> As to the issue of whether or not the court committed reversible error when it failed to find that Oaken Bucket had been prejudiced, the court looked to the plain language of IC 33-26-6-4 which provides, in part, that judicial relief is only available if the person seeking such relief has been prejudiced. The court found that IC 33-26-6-4 is not ambiguous, and that “[n]othing within [it] suggests that a party may only be harmed when it suffers a financial loss.”<sup>425</sup> Furthermore, the court found that a final determination of the IBTR may be prejudicial to the party that seeks its reversal, and therefore the court had not committed reversible error on this issue.<sup>426</sup> As to the contention that the court’s previous decision conflicted with the holdings in *Travelers’ Insurance Co.*<sup>427</sup> and *Spohn*,<sup>428</sup> the court held that no conflict existed.<sup>429</sup> In support of this holding, the court noted that in *Sangrlea Boys Fund, Inc. v. State Board of Tax Commissioners*,<sup>430</sup> the court found that a unity of ownership, occupancy, and use was not necessary in order to qualify for an exemption under IC 6-1.1-10-16.<sup>431</sup> The court further noted that in *Oaken Bucket I* it had explained that a lack of unity of ownership, occupancy, and use forced both entities to demonstrate that they possessed their own exempt purposes, but they did not need to demonstrate that they both directly used the property in furtherance of those purposes.<sup>432</sup> Finally, the court reiterated that the “evaluation of whether property is owned, occupied, and predominately used for an exempt purpose is a fact sensitive inquiry” and that “the totality of the evidence established that Oaken Bucket possessed its own charitable purpose and that its property was both occupied and predominately used for religious purposes.”<sup>433</sup> The court therefore affirmed its previous decision in *Oaken Bucket I*.

17. *Sandin Trust v. Michigan Township Assessor*.<sup>434</sup>—The R. Keith Sandin Trust (R. Keith Sandin, Trustee) challenged the final determination of the IBTR which had upheld the Michigan Township Assessor’s interim assessments of his property for the 2004 and 2005 tax years. Sandin owned residential property in

---

423. 50 N.E. 562 (Ind. 1898).

424. *Oaken Bucket Partners, LLC*, 914 N.E.2d at 869.

425. *Id.*

426. *Id.* at 869-70.

427. 50 N.E. 562 (Ind. 1898).

428. 150 N.E. 787 (Ind. 1926).

429. *Oaken Bucket Partners, LLC*, 914 N.E.2d at 871.

430. 686 N.E.2d 954 (Ind. T.C. 1997).

431. *Oaken Bucket Partners, LLC*, 914 N.E.2d at 870.

432. *Id.* at 870-871.

433. *Id.* at 871 (quoting and citing *Oaken Bucket Partners LLC v. Hamilton County Prop. Tax Assessment Bd. of Appeals*, 909 N.E.2d 1129, 1134-35 (Ind. T.C. 2009)).

434. No. 49T10-0811-TA-63, 2009 WL 4350702 (Ind. T.C. Dec. 2, 2009).

the Duneland Beach neighborhood of Michigan City, Indiana, which was valued at a base rate of \$672 per front foot.<sup>435</sup> Assessing officials applied this rate to Sandin's property and came up with a total assessed value of \$1,256,200. For the 2004 and 2005 tax years, the base rate for the Duneland Beach neighborhood increased to \$5000 per front foot, and as a result, the total assessed value of Sandin's property increased to \$1,729,900.<sup>436</sup> Sandin appealed to the LaPorte County PTABOA, which affirmed the assessments. Sandin then timely filed an appeal with the IBTR. The parties stipulated to drop the valuation issue with regard to Sandin's 2004 and 2005 assessment appeals pending before the Board, and therefore, neither party planned to offer appraisal evidence and no inspection of Sandin's property was required.<sup>437</sup> After to this stipulation, the only remaining issue to be decided by the Board was whether the township assessor was authorized under Indiana law to change the assessment for the 2004 and 2005 assessment years to a value different than the value finally determined for the March 1, 2002 assessment date.<sup>438</sup> Sandin argued at the administrative hearing that IC 6-1.1-9-1 only provided an assessing official with the authority to reassess a property between general reassessments if the official had a reasonable belief, founded upon objectively verifiable data, that the property was undervalued. Furthermore, Sandin argued that in his case the Assessor's belief that his property was undervalued was neither reasonable nor supported by objectively verifiable data.<sup>439</sup> The IBTR upheld the Assessor's interim assessments of Sandin's property, and Sandin timely filed an appeal with the Tax Court. On appeal, Sandin argued that the Assessor was not authorized under Indiana law to change his property assessment in 2004 and 2005 to a value different from its 2002 assessed value.

On appeal, Sandin argued that the Assessor did not have "a *reasonable* belief that his property was undervalued."<sup>440</sup> First, he argued that the Assessor's belief as to the undervaluing of his property was based on the Assessor's subjective opinion that some properties in the neighborhood were not valued correctly.<sup>441</sup> Therefore, Sandin asserted that the Assessor was required to offer objectively verifiable evidence that would justify this subjective belief. The administrative record showed that the increase in the Duneland Beach neighborhood base rate from \$672 per front foot to \$5000 per front foot was based on the Assessor's personal belief that the land all along Lake Shore Drive had been incorrectly valued in the 2002 general reassessment.<sup>442</sup> The Assessor formulated his belief because the 2002 general reassessment of property in the Duneland Beach neighborhood was derived by using the same front foot base rate, whether the

---

435. *Id.* at \*1.

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.* at \*3-4.

440. *Id.* (emphasis in original).

441. *Id.* at \*2.

442. *Id.*



property was lakeside, hillside, or even further inland. As a thirty-year resident of the area, “common sense” told the Assessor that such a valuation was improper.<sup>443</sup> Furthermore, the Assessor explained that while hearing and resolving taxpayer appeals related to the 2002 general reassessment, he received information, which indicated to him that the land along the Lake Shore Drive corridor was undervalued.<sup>444</sup> Finally, the Assessor explained that in 2004, the LaPorte County Assessor’s office had hired Nexus Group, a property tax consulting firm, to advise it on numerous assessment issues, including land valuation. Nexus Group issued a report recommending that the base rate for Duneland Beach should be \$5000 per front foot.<sup>445</sup> In response, Sandin argued that the Assessor’s reliance on the Nexus report was improper because the Assessor did not fully understand how Nexus arrived at its \$5000 per front foot recommendation and because the data relied upon by Nexus in formulating this rate was based on unreliable evidence.<sup>446</sup> The court ultimately held that it was sufficient for the Assessor to rely on his experience—both as a resident and as an assessing official—to formulate a belief that properties along Lake Shore Drive were valued incorrectly and this belief was sufficient to authorize an interim assessment of those properties he believed to be undervalued under IC 6-1.1-9-1.<sup>447</sup>

18. *Big Foot Stores LLC v. Franklin Township Assessor*.<sup>448</sup>—Big Foot Stores LLC challenged the IBTR’s final determinations, which upheld the 2003 interim assessments of Big Foot’s property by the Franklin Township Assessor, the Mill Township Assessor, the Pleasant Township Assessor, and the Grant County Assessor. In “the 2003 tax year, Big Foot owned three convenience stores . . . and one office building in Grant County, Indiana.”<sup>449</sup> In December 2005, the Assessors issued “Notices of Assessment By Assessing Officer” for the 2003 tax year.<sup>450</sup> The notices informed Big Foot that the properties were reassessed due to sales disclosure forms that suggested that the properties had been previously undervalued. In January 2006, Big Foot petitioned Grant County PTABOA for review. Big Foot alleged that the 2003 interim assessments were not uniform and equal, and “requested that the properties’ 2002 assessments be reinstated.”<sup>451</sup> The PTABOA denied each of Big Foot’s petitions and Big Foot timely filed four Petitions for Review with the IBTR. At the joint administrative hearing, Big Foot once again requested that its 2002 assessments be reinstated because it “believed that the interim assessments were not only not uniform or

---

443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.* at \*3.

448. 919 N.E.2d 621 (Ind. T.C. 2009).

449. *Id.* at 621.

450. *Id.* at 622.

451. *Id.*

equal, but unauthorized as well.”<sup>452</sup> The IBTR upheld the interim assessments in their entirety, finding that the assessments were “authorized under Indiana Code § 6-1.1-9-1, and [therefore] concluded that because Big Foot failed to present any probative evidence as to the actual market values-in-use of its properties, the Assessors’ interim assessments should be upheld.”<sup>453</sup> Big Foot timely filed four appeals, which were consolidated pursuant to the Indiana Rules of Appellate Procedure, and the court granted this motion. On appeal, Big Foot argued that the IBTR erred in upholding Big Foot’s 2003 interim assessments.<sup>454</sup>

Big Foot provided the court with two arguments in support of its assertion that the IBTR erred in upholding the 2003 interim assessments of its real. First, Big Foot claimed that interim assessments may be made only when there has been a change to the property that increases or decreases its value.<sup>455</sup> Big Foot alternatively “argued that its interim assessments were improper because they were essentially the result of ‘sales chasing,’ ‘selective reappraisals,’ or ‘spot assessments.’”<sup>456</sup> As to Big Foot’s first argument, the Assessors contended that IC 6-1.1-9-1 authorized the interim assessments because the sales disclosure forms had caused them to believe that the properties were undervalued.<sup>457</sup>

Based on the court’s previous holding in *Charwood LLC v. Bartholomew County Assessor*,<sup>458</sup> the court found that the Assessors “were authorized under Indiana Code § 6-1.1-9-1 [to conduct interim assessments], despite the fact that none of the properties had experienced physical changes or changes in use.”<sup>459</sup> As to Big Foot’s argument in the alternative that the interim assessments were actually “spot assessments,” the Assessors asserted that although spot assessments are highly disfavored in Indiana, they did not selectively reassess Big Foot’s property.<sup>460</sup> Instead, the Assessors adjusted Big Foot’s assessments because of Big Foot’s filing sales disclosure forms that plainly showed that Big Foot’s property was undervalued.<sup>461</sup> The court found this issue to be one of first impression in Indiana, but decided not to analyze the issue because this particular case could be resolved on other grounds.<sup>462</sup> Therefore, the court held that the Assessors had failed to demonstrate to the IBTR that the June 19, 2002 and July 16, 2003 sales prices of Big Foot’s properties “were related to the values [of those properties] as of January 1, 1999.”<sup>463</sup> The court reversed the final determinations of the IBTR and remanded the cases to the IBTR for further

---

452. *Id.*

453. *Id.*

454. *Id.* at 622-23.

455. *Id.*

456. *Id.* at 623.

457. *Id.* at 624.

458. 906 N.E.2d 946, 951 (Ind. T.C. 2009); *see supra* notes 322-42.

459. *Big Foot Stores LLC*, 919 N.E.2d at 624.

460. *Id.*

461. *Id.* at 625.

462. *Id.*

463. *Id.* at 626.



proceedings.

19. *Robey v. Fairfield Township Assessor*.<sup>464</sup>—Wayne Robey challenged Fairfield Township Assessor's assessment of his real property for the 2004 and 2005 tax years.<sup>465</sup> Robey owned residential real property in Lafayette, Indiana, assessed at \$42,800, which Robey believed was an incorrect amount.<sup>466</sup> The IBTR found that Robey had failed to "prima facie demonstrate that his assessment was incorrect."<sup>467</sup> Robey timely filed an appeal with the Tax Court arguing that the IBTR's final determination was improper.

Robey argued that during the administrative hearing he had demonstrated, with probative evidence, that his property's assessed value was incorrect. Robey specifically claimed that he had presented four different types of evidence demonstrating that his land assessment was improper. This evidence included a value-in-use method using comparable properties, a land comparison method, evidence that his house should have received a condition rating of fair, and, finally, a linear interpolation method.<sup>468</sup> As to the value-in-use method, Robey argued that his assessment violated article 10, section 1 of the Indiana Constitution because it was not uniform and equal. The court rejected this argument finding that the evidence presented by Robey during the administrative hearing on this issue was not objectively verifiable data but rather his own subjective opinion of the value of a comparable property.<sup>469</sup> As to Robey's land comparison method, he presented such evidence at the administrative hearing wherein he essentially obtained a value by applying a two-part formula where

first, he divided the quotient of his property's assessed value and its frontage by its depth factor to ascertain its effective front foot value (the EFFV); then, he multiplied his property's frontage, depth factor, and the EFFV of the designated base lot to ascertain his property's purported market value-in-use.<sup>470</sup>

Robey based these calculations on the premise that "(1) the assessed value assigned to each of the selected parcels was correct; (2) that those assessed values contained no adjustments for influence factors; and (3) that one of the parcels was the base lot."<sup>471</sup> The court found that land comparison method did not demonstrate that the Assessor had incorrectly assessed the land.<sup>472</sup> As to Robey's contention that his house should have received a condition rating of fair, Robey argued that he established that the Assessor erred in assigning his house a condition rating of "average" because a condition rating of "fair" more

---

464. No. 49T10-0708-TA-42, 2009 WL 4668740 (Ind. T.C. Dec. 9, 2009).

465. *Id.* at \*1.

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.* at \*2.

470. *Id.* at \*3.

471. *Id.* (footnote omitted).

472. *Id.*

accurately reflected its physical condition.<sup>473</sup> The court noted that the market value-in-use of an improvement must reflect the presence of any physical depreciation, but the court held that the totality of Robey “failed to relate the condition of his house to sufficient market data for his neighborhood” and therefore Robey’s evidence was not persuasive.<sup>474</sup> Finally, as to Robey’s linear interpolation method of valuation, the court found Robey’s attempts to base his assessment on past purchases prices to be unpersuasive. Specifically, the court held that Robey’s linear interpolation method ignored the actual workings of the market because it failed to take into account the fact that real property is more likely to appreciate or depreciate at differing rates, rather than at a constant rate over a twenty-year period.<sup>475</sup> Based on these holdings, the court affirmed the decision of the IBTR.

20. *Moffett v. Indiana Department of Local Government Finance*.<sup>476</sup>—On September 11, 2009, the DLGF approved a “proposed lease rental agreement between the Union-North United School Corporation and the Union-North United School Building.”<sup>477</sup> The School Corporation served a district that covered parts of both St. Joseph and Marshall Counties.<sup>478</sup> In 2008, George M. Moffett (“Moffett”) filed an appeal with the Tax Court challenging the DLGF’s final determination. The court remanded the matter to the DLGF on August 19, 2009 “with instructions to enter specific findings of fact upon which its original final determination was based.”<sup>479</sup> Almost a month later, on September 11, 2009, Moffett challenged DLGF’s final determination.

The court noted that “[w]hen the DLGF reviews school construction projects, it does so as a tax specialist.”<sup>480</sup> IC 20-46-7-11 requires the DLGF to consider several factors when considering approving such a construction project including the current and proposed square footage, enrollment patterns, age and condition of current facilities, effect of the construction project on the school corporation’s tax rate, and other pertinent matters.<sup>481</sup> The court further noted that in considering these factors, “DLGF is not required to assign greater weight to any one of the statutorily listed factors, nor is it required to consider any single factor dispositive . . . ; in fact, it need not even base its ultimate decision on them.”<sup>482</sup> The court noted that it appeared that the DLGF approved the project after considering each of the statutory imposed factors. On appeal, Moffett argued that the DLGF’s final determination would “result in financial difficulty and

---

473. *Id.*

474. *Id.* at \*4.

475. *Id.* at \*4-5.

476. No. 49T10-0810-TA-58, 2009 Ind. Tax LEXIS 60 (Ind. T.C. Dec. 16, 2009).

477. *Id.* at \*1.

478. *See supra* notes 398-400 for additional facts relating to the school.

479. *Moffett*, 2009 WL 4885334 at \*3-4.

480. *Id.* at \*3-4.

481. *Id.* at \*5-6.

482. *Id.* at \*6 (citations omitted).



[excessive] taxation” due to the current state of the economy.<sup>483</sup> Furthermore, Moffett argued that “[t]he tax burden resulting from the proposed project [would not be] fairly or equitably distributed between the taxpayers of St. Joseph County and the taxpayers of Marshall County; [and] [t]he School Corporation misled the DLGF into approving the project by giving it false and inaccurate information.” With respect to the current state of the economy, the court found that, “despite economic conditions, more taxpayers decided that they were willing to finance the project than not.”<sup>484</sup> With respect to the unfair distribution of the tax burden, the court found that Moffett had failed to demonstrate that either property in Union Township, St. Joseph County has been assessed at a different rate than property in North Township, Marshall County, or that the property of the taxpayers in Union Township was subject to a different tax rate than the property of the taxpayers in North Township.<sup>485</sup> Finally, as to Moffett’s claim that the School Corporation misled the DLGF, the court found that Moffett had failed to demonstrate to the court that there was “probative evidence in the administrative record that demonstrated that the DLGF’s reasoning was not supported by substantial evidence.”<sup>486</sup> The court concluded that all Moffett had demonstrated was that he did not think the proposed project was a good idea, but he failed to demonstrate that the DLGF’s final determination was not supported by substantial evidence or not in accordance with the law.<sup>487</sup>

21. *Klosinski v. Department of Local Government Finance*.<sup>488</sup>—This matter came before the court when Michael H. and Phyllis J. Klosinski filed a petition with the Tax Court, challenging the DLGF approval and certification of the Cordry Sweetwater Conservancy District’s (CSCD) budgets and tax levies for the 2007 and 2008 tax years.<sup>489</sup> The Klosinskis asserted in their petition “that the CSCD’s levies were illegal as a matter of law because the taxes were not used to accomplish the CSCD’s stated purposes” and the DLGF did not have the authority to approve the tax levies.<sup>490</sup> In response, the DLGF filed a motion to dismiss for lack of subject matter jurisdiction and a motion for judgment on the pleadings. As to the motion to dismiss, the DLGF argued that the court lacked subject matter jurisdiction because the Klosinskis had not exhausted the appropriate administrative remedies before filing their petition with the Tax Court and therefore they had no final determination from any administrative agency upon which to appeal.<sup>491</sup> The court found that “[w]hile the Klosinskis contend that they were challenging the propriety of the DLGF’s approval and certification of the CSCD’s 2008 budget/tax levy, they were actually attacking

---

483. *Id.* at \*8.

484. *Id.* at \*10.

485. *Id.* at 12-13.

486. *Id.* at 14-15.

487. *Id.* at 16.

488. No. 49T10-0909-TA-50, 2009 WL 4876790 (Ind. T.C. Dec. 17, 2009).

489. *Id.* at \*1.

490. *Id.*

491. *Id.* at \*3-4.

the propriety of the CSCD's 2008 budgetary appropriations."<sup>492</sup> Therefore, the court held that the "Klosinskis were required to pursue their claim in accordance with the provisions of Indiana Code §§ 14-33-9-1 and 6-1.1-17 et seq."<sup>493</sup> In failing to exhaust all administrative remedies, the Klosinskis could not appeal to the Tax Court because there was no final determination upon which to appeal.<sup>494</sup> As to the motion for judgment on the pleadings, the DLGF asserted that judgment on the pleadings was appropriate because of the Klosinskis failure to exhaust the applicable administrative remedies.<sup>495</sup> The court agreed holding that "the Klosinskis' challenge to the CSCD's budget should have been funneled through the adjudicatory channels provided under Indiana Code §§ 14-33-9-1 and 6-1.1-17 et seq."<sup>496</sup> Therefore, the court granted both the motion to dismiss and the motion for judgment on the pleadings.<sup>497</sup>

22. *Elliott v. Dunning*.<sup>498</sup>—Donald F. Elliott, Jr. challenged "the final determination of the [IBTR] which had upheld the Marshall County Assessor's assessment of his real property for the 2006 tax year."<sup>499</sup> Elliott owned three parcels of residential real property along Lake Maxinkuckee near Culver, Indiana. Two of the parcels were on the lake and not subject to an appeal; however, one parcel, described as Parcel 13, had no direct view of, or access to, Lake Maxinkuckee.<sup>500</sup> Elliott appealed Parcel 13's assessment of \$209,900 for the 2006 tax year, to the Marshall County PTABOA, which subsequently denied this appeal. Elliott timely filed a Petition for Review with the IBTR, asserting that "the assessed value of Parcel 13 should be \$69,968."<sup>501</sup> After the IBTR upheld the Assessor's assessment, Elliott timely filed an appeal with the Tax Court arguing that he had prima facie demonstrated that his land assessment was incorrect.

On appeal, the court noted that "both Elliott and the Assessor designated Parcel 1 as the front lot to Parcel 13 . . . during the administrative hearing."<sup>502</sup> The court further noted that the parties had also agreed that Parcel 13 was a rear lot.<sup>503</sup> Based on these facts, the issue in dispute on appeal concerned the "application of the seven-step formula contained in Indiana's assessment guidelines by which the depth factor of a rear lot should be determined."<sup>504</sup> Specifically, Elliott argued that the Assessor had misapplied the first step in this

---

492. *Id.* at \*2.

493. *Id.*

494. *Id.*

495. *Id.*

496. *Id.*

497. *Id.*

498. No. 49T10-0812-TA-69, 2009 WL 4981025 (Ind. T.C. Dec. 23, 2009).

499. *Id.* at \*1.

500. *Id.*

501. *Id.* at \*2.

502. *Id.*

503. *Id.*

504. *Id.* (citation omitted).



formula regarding the overall depth of the rear lot. “Elliott assert[ed] that the use of the word ‘overall’ signal[ed] that the effective depths of both the front and rear lots must be added together in order to ascertain the overall depth of the rear lot,” and therefore the effective depth of Parcel 13 was 345 feet.<sup>505</sup> Elliott used this figure when applying the seven-step formula to determine his proposed assessed value. Conversely, the Assessor argued that the formula proposed by the guidelines did not require the summation of both lots, and that any differences between the Assessor’s figures and Elliott’s was simply the result of a “mathematical error and a misunderstanding of the formula.”<sup>506</sup> The court found that Elliott’s claim presented “an issue of regulatory construction: . . . regarding the meaning of the word ‘overall’ within the context of the guidelines’ formula.”<sup>507</sup> Specifically, the court held that the “practical effect of the Assessor’s application of the formula produc[ed] an unjust and absurd result.”<sup>508</sup> The court further held that Elliott’s interpretation and application of the formula mirrored the assessment data in both the depth factors and assessed values.<sup>509</sup> Based on these findings, the court held that Elliott had *prima facie* demonstrated that the assessment of Parcel 13 was incorrect and the case was remanded to the IBTR to take actions consistent with the court’s opinion.<sup>510</sup>

### *B. Sales and Use Tax*

1. *Belterra Resort Indiana, LLC v. Indiana Department of State Revenue.*<sup>511</sup>—Belterra Resort Indiana, LLC appealed the Department proposed use tax assessment. Belterra, a Nevada corporation, owned and operated the Belterra Casino Resort in Switzerland County, Indiana. In September 1999, Pinnacle Entertainment, Inc., parent of Belterra, contracted with Alabama Shipyard, Inc. to construct the riverboat casino.<sup>512</sup> Approximately a year later, title to and possession of the riverboat casino was conveyed to Pinnacle at Alabama Shipyard’s dock in Mobile, Alabama. Pinnacle paid no Alabama sales tax on this transaction. On July 25, 2000, the title to the riverboat casino was transferred to Belterra while the boat was in international waters. In the written consent to transfer the [boat], “Pinnacle’s Board of Directors provided that the transfer of the boat was a capital contribution for which no consideration was received.”<sup>513</sup> At the time of the transfer, Pinnacle owned a ninety-seven percent interest in Belterra and after Belterra began operations, Pinnacle acquired the

---

505. *Id.*

506. *Id.* at \*3.

507. *Id.*

508. *Id.*

509. *Id.* at \*4.

510. *Id.* at \*4-5.

511. 900 N.E.2d 513 (Ind. T.C. 2009).

512. *Id.* at 514.

513. *Id.*

remaining interest in Belterra.<sup>514</sup> In 2002, the Department audited the sales and use tax book of Belterra for 2000 tax year and issued a proposed use tax assessment against Belterra on its acquisition of the riverboat casino. Belterra timely protested the proposed assessment, and such protest was denied after a proper hearing.<sup>515</sup> Belterra timely filed an appeal with the Tax Court arguing that the acquisition of its riverboat casino should not be subject to use tax because it had not acquired the boat in a retail transaction. The parties filed cross motions for summary judgment requesting relief.

The court noted that Indiana's use tax is "imposed on the storage, use, or consumption of tangible personal property that was acquired in a retail transaction regardless of the location of that transaction."<sup>516</sup> Belterra argued on appeal that the acquisition was not a retail transaction because the riverboat casino was not acquired for consideration.<sup>517</sup> But the Department "argue[d] that Belterra owe[d] the tax because the [riverboat casino] was acquired in a retail transaction (albeit by someone other than Belterra), no sales tax was paid on the transaction, and the boat was subsequently used in Indiana."<sup>518</sup> In the alternative, the Department argued that the transfer of the remaining three percent of Belterra's stock to Pinnacle or when it agreed to operate the boat as a casino.<sup>519</sup> Lastly, "the Department contend[ed] that the transaction at . . . [as] 'little more than an empty formality'" designed to avoid tax."<sup>520</sup> The court rejected the Department's assertion that Belterra did not acquire the riverboat casino in a retail transaction. The court further found that the Department had failed to provide any evidence that Belterra had given the three percent of Belterra's stock in exchange for the riverboat casino.<sup>521</sup> As to the Department's final argument, the court noted that the subject transaction may seem suspicious, but the court found that Belterra had provided a sufficient explanation that the structure of the transaction was necessary due to Pinnacle's access to capital and credit resources.<sup>522</sup> Based on these findings, the court held that the transaction was not subject to the use tax and Belterra was entitled to summary judgment.<sup>523</sup>

2. *Cincinnati SMSA Limited Partnership v. Indiana Department of State Revenue*.<sup>524</sup>—*Cincinnati SMSA Limited Partnership and New Cingular Wireless PCS, LLC and Westel-Milwaukee, LLC (CSLP)* appealed the Department's "denial of their claims for refund of gross retail tax paid during [] 2000 and

---

514. *Id.* at 514-15.

515. *Id.* at 515.

516. *Id.* (citing IND. CODE § 6-2.5-3-2(a) (2006)).

517. *Id.*

518. *Id.*

519. *Id.*

520. *Id.*

521. *Id.*

522. *Id.* at 516-17.

523. *Id.*

524. No. 49T10-0409-TA-45, 2009 WL 2579438 (Ind. T.C. Aug. 21, 2009).



2001.”<sup>525</sup> During 2000 and 2001, CSLP provided services to mobile phone subscribers within Indiana, including selling “bundled” calling plans. For a flat monthly fee, CSLP provided these customers a pre-determined number of airtime minutes. In an effort “to provide seamless cellular telephone coverage to their customers,” CSLP executed several “‘Inter-carrier Roamer Service Agreements’ with other cellular service providers.”<sup>526</sup> Under these roaming agreements when a CSLP customer used a cell phone outside of CSLP’s coverage area, the foreign carrier would provide service. “In exchange, CSLP agreed to bill their customers for the roaming charges, including all applicable state and local taxes; collect the payments from their customers; and then remit those payments to the” other cellular service provider.<sup>527</sup> In November 2002, CSLP sought a refund of \$1,753,586.51 for the sales tax they had remitted to the Department related to their Indiana customer’s roaming cellular telephone calls. In August 2004, the Department denied some, but not all, of CSLP’s claims.<sup>528</sup> CSLP timely filed an appeal with the Tax Court, and shortly thereafter filed a motion for summary judgment.

The parties essentially presented two arguments with regard to the motion for summary judgment. First, the Department argued that “the original and supplemental affidavits of Robert Landau and Mark Mercer should be disregarded pursuant to the *Blinn/McCullough* Rule.” The court noted that under the *Blinn/McCullough* Rule if the “evidence before a court raises a genuine issue as to an affiant’s credibility, it would be improper ‘to base summary judgment solely on such a self-serving affidavit.’”<sup>529</sup> Specifically, the Department maintained that *Blinn/McCullough* Rule applied because the affidavits of Landau and Mercer contained inconsistencies as to both of the affiant’s employment histories and their statements on CSLP’s refund calculations.<sup>530</sup> The court, however, found that any inconsistencies with respect to the employment histories in Landau and Mercer’s original affidavits had been rectified by their supplemental affidavits. The court further found that “the affidavits did not contain inconsistencies with respect to CSLP’s refund calculations.”<sup>531</sup> Accordingly, the court held that the *Blinn/McCullough* Rule did not apply in this case.

CSLP asserted, on the other hand, that it had demonstrated that the Department erred in concluding that CSLP was not entitled to a refund of Indiana sales tax for 2000 and 2001. Specifically, CSLP argued that by remitting too much sales tax, they were entitled to summary judgment. CSLP claimed the “bundled” calling plans contained both charges in advance for the pre-set number

---

525. *Id.* at \*1.

526. *Id.*

527. *Id.*

528. *Id.*

529. *Id.* at \*2 (quoting *Insuremax Ins. Co. v. Bice*, 879 N.E.2d 1187, 1190 (Ind. Ct. App. 2008)).

530. *Id.*

531. *Id.* at \*3.

of airtime minutes, and charges in arrears for airtime minutes used beyond those provided under the plans.<sup>532</sup> CSLP argued that they were entitled to a refund because the Department insisted on CSLP paying the sales tax “up-front” before the “bundled” minutes were even used, and this practice resulted in CSLP paying a tax on the same airtime minutes a second time when they paid the other cellular service providers for their provision of roaming services.<sup>533</sup> In support of this argument, CSLP submitted the affidavits of Robert Landau and Mark Mercer discussed earlier. The court found that the only evidence CSLP has submitted to substantiate their claim of entitlement to a \$1.7 million refund was their affiants’ testimony, and CSLP did not provide any actual “calculations, analyses, reports, or other underlying data to support that number.”<sup>534</sup> The court further noted that the reliability of Landau’s and Mercer’s testimony had been called into question by Department. Therefore, the court held that there was a genuine issue as to the actual amount of CSLP’s overpayment of tax, and CSLP’s motion for summary judgment had to be denied.<sup>535</sup>

3. *Ameritech Publishing, Inc. v. Indiana Department of State Revenue*.<sup>536</sup>—A similar case came before the court previously in *Ameritech Publishing, Inc. v. Indiana Department of State Revenue (API I)*.<sup>537</sup> *API I* was issued nearly four years ago, and the court held that, during a portion of the 1998 through 2003 tax years, Ameritech Publishing, Inc.’s (API) out-of-state purchases and its in-state use of telephone directories were not subject to Indiana use tax.<sup>538</sup> The court ordered as a result the Department to refund API over \$2.5 million.<sup>539</sup> During the time of the *API* litigation, API filed another claim requesting an additional refund of \$1,320,374.57 for taxes paid on items of issue in the first case from the October 1, 2003 through the December 31, 2005. In April 2008, the Department denied API’s claim. API timely filed an appeal with the Tax Court arguing that API’s use of its telephone directories in Indiana should not be subject to Indiana’s use tax. Both parties filed cross-motions for summary judgment.<sup>540</sup>

The court noted that in *API I*, it had held “that API’s purchases of paper and printing services and its use of telephone directories were not subject to Indiana use tax.”<sup>541</sup> The court in *API* noted three reasons why API was not subject to use tax:

- (1) while API acquired the paper at retail, it was consumed entirely in

---

532. *Id.*

533. *Id.*

534. *Id.* at \*4.

535. *Id.* at \*5.

536. 916 N.E.2d 752 (Ind. T.C. 2009).

537. No. 49T10-0305-TA-26 (Ind. T.C. Oct. 19, 2006), *trans. denied*, 869 N.E.2d 451 (Ind. 2007).

538. *Ameritech Publ’g, Inc.*, 916 N.E.2d at 752.

539. *Id.* at 753.

540. *Id.*

541. *Id.* at 754.



the out-of-state production process and, therefore, never used it in Indiana; (2) API did not acquire tangible personal property when it purchased printing services; and (3) API used its telephone directories in Indiana, it did not acquire them in a retail transaction.<sup>542</sup>

In *API*, the Department presented three arguments in support of summary judgment. First, the Department argued that this case presents distinct facts from the key precedent cited in *API I*, namely *Morton Buildings, Inc. v. Indiana Department of State Revenue*.<sup>543</sup> Second, the Department argued that RR Donnelley was a “manufacturer/commercial printer and not just a service provider; and finally that, as a commercial printer, RR Donnelley necessarily acquires tangible personal property . . . in order to resell that property to its customers in the form of printed materials.”<sup>544</sup> The court rejected the Department’s first argument with regard to application of *Morton* finding that, as was the case in *API I*, the court found the holding of *Morton* to be instructive, not simply due to its facts.<sup>545</sup> Furthermore, the court found that the “relevant inquiry continue[d] to be whether the two conditions of IC 6-2.5-3-2 were satisfied.”<sup>546</sup> Specifically, the court looked to “whether API acquired tangible personal property in a retail transaction; and, if so, whether API used, stored, or consumed that tangible personal property in Indiana.”<sup>547</sup> The court further found that the Department’s final two arguments sought to subject API to Indiana’s use tax due to API contractual relationship with a commercial printer.<sup>548</sup> The court affirmed its holding in *API I*, however, stating that a retail transaction will not be found to exist merely due to the status of the players.<sup>549</sup> The court further found that API was entitled to judgment as a matter of law because the material facts and the Department’s arguments were the same as those resolved in *API I*.<sup>550</sup>

*C. Corporate Income Tax: Wendt LLP v. Indiana Department  
of State Revenue*<sup>551</sup>

On January 5, 2007, Wendt LLP filed a “Petition to Set Aside Final Determination of the Indiana Department of Revenue” with the Tax Court. Wendt appealed the Department’s Letter of Findings that was issued on September 11, 2006. On September 11, 2008, Wendt moved to amend its Petition for the sole purpose of clarifying that its appeal covers the 2001-04 tax

---

542. *Id.* (citing *Ameritech Publ’g, Inc. v. Ind. Dep’t of State Revenue*, 855 N.E.2d (Ind. T.C. 2006)).

543. 819 N.E.2d 913 (Ind. T.C. 2004).

544. *Ameritech Publ’g, Inc.*, 916 N.E.2d at 754.

545. *Id.*

546. *Id.*

547. *Id.* at 755-56.

548. *Id.* at 756.

549. *Id.*

550. *Id.* at 757.

551. No. 02T10-0701-TA-2, 2009 WL 396034 (Ind. T.C. Feb. 17, 2009).

years. The Department filed an objection to this Motion to Amend. The court found that Wendt's petition covered the 2002-04 tax years.<sup>552</sup> The court also found that Wendt's appeal covered the 2001 tax year. Therefore, the court held that there was no need for Wendt to amend its Petition to include the purportedly omitted years.<sup>553</sup>

The Department made procedural motions regarding Wendt's motion to amend to include the 2001 tax year and also moved to strike certain exhibits and paragraphs included with Wendt's motion to amend because they "violated Indiana Rule of Evidence 408 by referring to confidential aspects of the parties' settlement discussions."<sup>554</sup> In response, Wendt argued that Rule 408 was inapplicable because Wendt had not referred to the parties' settlement discussions to show that the Department had erroneously denied its claims. Instead, Wendt asserted that it had only referred to them to demonstrate that the Department knew that Wendt's petition covered the 2001-2004 tax years.<sup>555</sup> The court held that Wendt had referenced the parties' settlement discussions for the proper purpose of demonstrating that Wendt's challenge of the 2001-04 tax years was properly before the court.<sup>556</sup>

*D. Personal Income Tax: Lacey v. Indiana Department of State Revenue*<sup>557</sup>

On June 12, 2009, Lyle Lacey appealed to the Tax Court. The Department moved to dismiss Lacey's complaint under Indiana Trial Rule 12(B)(6) on August 4, 2009. Lacey's complaint alleged that he did not owe Indiana adjusted gross income tax for the 2007 tax year because he owed no federal income tax.<sup>558</sup> The Department contended that the court should dismiss the Lacey Complaint because there was no basis for a claim regarding Lacey's federal income tax liability in the Tax Court. The court held that the Department's contention was essentially accurate, but the court did have the authority to analyze federal law to the extent the legislature had referentially incorporated federal law in the Indiana Adjusted Gross Income Tax Act of 1963.<sup>559</sup> Based on this holding, the court denied the Department's motion dismiss on this claim.<sup>560</sup>

Lacey's complaint also set forth three other general claims. First, Lacey argued that under both the Seventh Amendment of the U.S. Constitution and article 1, section 20 of the Indiana Constitution, he was entitled to have his original tax appeal heard by a jury. Second, Lacey contended that although jurisdiction of the case was with the Tax Court, the Tax Court judge could not

---

552. *Id.* at \*1.

553. *Id.*

554. *Id.*

555. *Id.* at \*2.

556. *Id.*

557. 2009 Ind. Tax LEXIS 45 (Ind. T.C. Oct. 26, 2009).

558. *Id.* at \*3.

559. *Id.*

560. *Id.* at \*6.



rule on the case because he had a conflict of interest. Finally, the complaint argued “that the Department violated the separation of powers provision of Indiana’s Constitution when its administrative law *judge* conducted an administrative hearing on Lacey’s protest.”<sup>561</sup> The court rejected all of Lacey’s arguments and granted the Department’s motion to dismiss on these claims.<sup>562</sup>

*E. Utility Receipts Tax: Enhanced Telecommunications Corp. v. Indiana Department of State Revenue*<sup>563</sup>

Enhanced Telecommunications Corp. (ETC) challenged the Department imposition of Indiana’s utility receipts tax (URT) on certain monies it received during the years 2003, 2004, and 2005.<sup>564</sup> ETC, a small telecommunications company headquartered in Sunman, Indiana, provided telephone equipment and services, cellular phone equipment, cable services, and internet services to its Indiana customers.<sup>565</sup> ETC provided its customers with local telephone service only, but also facilitated long distance calls made by, and to, its customers. ETC also benefitted from Federal Communications Commission and Indiana Utility Regulatory Commission authorization by which the company could “offset, or recover, some of the costs of operation.”<sup>566</sup> This system permits ETC to charge subscribers for a portion of their line costs associated with long distance call activity. During 2003, 2004, and 2005, ETC billed its subscribers for these line costs and the line costs were separately stated on ETC’s bills. Second, ETC received subsidy distributions from the Universal Service Fund (USF), as well as from an equivalent IURC fund.<sup>567</sup> For 2003, 2004, and 2005, ETC filed an Indiana Utility Receipts Tax Return with the Department and paid all tax due in conjunction with each return. The Department audited those returns and determined that ETC had underreported its URT liability. Specifically, the Department determined that ETC had failed to report the various distributions it received as gross receipts subject to the URT.<sup>568</sup> ETC protested the proposed assessments and sent a letter to the Department claiming that the money it collected during the years at issue in the form of government subsidies should not have been reported as gross receipts subject to the URT. ETC further “claimed that between this error and its protest of the proposed assessments, it was actually entitled to a URT refund totaling \$24,348.46.”<sup>569</sup> The Department denied ETC’s protest after an administrative hearing on the issue.<sup>570</sup> ETC timely filed an appeal

---

561. *Id.* at \*3-4. (emphasis in original)

562. *Id.* at \*7.

563. 916 N.E.2d 313 (Ind. T.C. 2009).

564. *Id.* at 313.

565. *Id.* at 313-14.

566. *Id.* at 314.

567. *Id.* at 315.

568. *Id.*

569. *Id.* at 316.

570. *Id.*

with the Tax Court arguing that the money ETC collected from its customers in “subscriber line charges” (SLC) and “federal universal service contribution recoveries” (FUSCR) were not subject to the URT, and that the distributions ETC received through various federal and state subsidy programs were not subject to the URT.<sup>571</sup>

The court first dealt with the issue of whether the money ETC collected in SLCs and FUSCRs should have been subject to the URT. In dealing with this issue, the court first analyzed whether the SLCs and FUSCRs should be excluded from ETC’s gross receipts as “fees” or “surcharges.”<sup>572</sup> The court noted that the legislature had not defined the terms “fees” and “surcharges” for purposes of URT, and the court gave those words their plain, ordinary and usual meaning, as defined in the dictionary.<sup>573</sup> Based on the dictionary definitions of these terms, the court held that the SLCs and FUSCRs were “fees” or “surcharges” because they were charges that were in addition to and separate from ETC’s charges for its basic monthly service. Therefore, the court held the money ETC collected in SLCs and FUSCRs was excluded from its gross receipts for purposes of the URT.<sup>574</sup>

Next, the court analyzed whether or not the distributions ETC received through various federal and state subsidy programs should be subject to the URT. The court first looked to the definition of the term “gross receipts.” The court looks to IC 6-2.3-3-3 which defines the term “gross receipts” as essentially any legal settlement.<sup>575</sup> The court next looked to how the Indiana Code used the term “settlement.” The court found that the term “settlement” with regard to the government subsidies were not legal settlements, and therefore “they [did] not qualify as gross receipts pursuant to Indiana Code § 6-2.3-3-3.”<sup>576</sup> The court further found that the government subsidies clearly did not meet the terms of IC 6-2.3-3-10 because they were used to offset the general costs of overall line use and maintenance.<sup>577</sup>

Finally, the court addressed two other, more general arguments made by Department to support its taxation of ETC’s charges and distributions. Department argued that the charges and distributions are gross receipts because ETC receives them. The court, however, found that ETC’s receipt of the SLCs, FUSCRs, and distributions were not received in consideration for the retail sale of utility services for consumption and therefore not subject to the URT.<sup>578</sup> In its final argument, the Department claimed that the intent of the legislature in creating the URT in 2002, was “to increase tax revenues from utility companies,” and ETC’s charges and distributions should be included in gross receipts in order

---

571. *Id.* at 313.

572. *Id.* at 317.

573. *Id.*

574. *Id.*

575. *Id.* at 319.

576. *Id.*

577. *Id.*

578. *Id.* at 320.



to further that goal.<sup>579</sup> The court noted, however, that the State's power to tax is contingent upon the occurrence of a specific event as prescribed by the applicable statutes. Based on this observation, the court held that to the extent ETC has demonstrated that its SLCs, FUSCRs, and government subsidies did not fall within the meaning of "taxable gross receipts" for purposes of the URT, the items failed to meet the requirements of the statute.<sup>580</sup>

The court concluded that the SLCs, FUSCRs, and the other government subsidies should not be subject to the URT.

---

579. *Id.*

580. *Id.* at 320-21.





# RECENT DEVELOPMENTS IN INDIANA TORT LAW

MILTON AUGUSTUS TURNER\*

This Article discusses noteworthy tort law in Indiana during the survey period, October 1, 2008 through September 30, 2009. It is not intended as a comprehensive or exhaustive overview.

## I. STATUTORY UPDATES

The survey period saw a number of new Acts enacted by the Indiana General Assembly in a number of areas. The subject matter is neither a comprehensive nor an exhaustive examination of legislative updates applicable to tort law during the survey period. Moreover, Indiana courts have yet to hand down a decision concerning the legislative updates.

### *A. Qualified Immunity for School Personnel*

During the survey period, the General Assembly amended Indiana Code section 20-33-8-8 to grant qualified immunity to school corporation personnel with respect to a disciplinary action taken to promote student conduct “if the action is taken in good faith and is reasonable.”<sup>1</sup> Such disciplinary action must “promote student conduct that conforms with an orderly and effective educational system.”<sup>2</sup>

### *B. Qualified Immunity for Youth Shelters*

An entity that “is not operated for profit”<sup>3</sup> but “provides, at a minimum, necessary services to runaway or homeless youths,”<sup>4</sup> is now immune from civil liability resulting from any act or omission related to admitting, caring for, or releasing a runaway or homeless youth, including its directors, employees, agents, or volunteers.<sup>5</sup> But the General Assembly created an exception for acts

---

\* J.D. Candidate, 2010, Indiana University School of Law—Indianapolis; M.A. Candidate, 2010, Indiana University; B.A., 2005, Wabash College, Crawfordsville, Indiana. I would like to give great thanks Chris Worden of The Worden Law Office, Indianapolis, Indiana, for his tireless efforts in helping me to perfect and edit this Article, believing in me like a father would his son, and pushing me to be my best in all things in law and in life, Professor Gerald Magliocca for being the first to offering his support to me and walking me through the note-writing process, and finally, Daniel Pulliam for giving me the opportunity to publish my first article.

1. IND. CODE § 20-33-8-8(b)(3) (Supp. 2009) (The addition of subsection (b)(3) was the only change to this section of the statute during the survey period.).

2. *Id.* § 20-33-8-8(b)(2).

3. *Id.* § 34-30-25-3(1).

4. *Id.* § 34-30-25-3(2).

5. *Id.* § 34-30-25-4. “Necessary services” are defined as the following:

1. Engaging in outreach services to locate and assist runaway or homeless youths.
2. Providing food and access to overnight shelter to a runaway or homeless youth.
3. Counseling a runaway or homeless youth to address immediate psychological or

of "gross negligence or willful and wanton misconduct."<sup>6</sup> The General Assembly defined "runaway or homeless youth" as an individual between the ages of twelve and eighteen years old who is unemancipated, mentally competent, or lives in a situation described in 42 U.S.C. § 11434a(2)(B)(ii) or § 11434a(2)(B)(iii) regardless of whether the parent, guardian, or custodian had knowledge or gave consent.<sup>7</sup>

## II. NEGLIGENCE

### A. Duty of Care

In *Clary v. Dibble*,<sup>8</sup> the Indiana Court of Appeals affirmed the trial court's grant of summary judgment as to the plaintiff's claims of negligence and respondeat superior.<sup>9</sup> The morning of a K&P Roofing Siding & Home Improvement's ("K&P") golf tournament, Patrick H. Dibble, an independent contractor, consumed a prescription pain reliever and had a hangover from drinking the night before.<sup>10</sup> K&P employees saw that Dibble was visibly nauseated throughout the day.<sup>11</sup> Upon leaving the tournament, Dibble struck two motorcyclists, killing one.<sup>12</sup>

The court concluded that K&P did not owe plaintiffs a duty to prevent Dibble from leaving the golf course impaired.<sup>13</sup> The court first recited the elements plaintiffs must establish under the theory of negligence as: "(1) defendant's duty to conform his conduct to a standard of care arising from his relationship with the plaintiff, (2) A failure of the defendant to conform his conduct to that standard of care, and (3) An injury to the plaintiff proximately caused by the breach."<sup>14</sup>

The court then restated the balancing factors for determining whether a duty exists: (1) the parties' relationship; (2) the harm's reasonable foreseeability to

---

emotional problems.

4. Screening a runaway or homeless youth for basic health needs and referring a runaway or homeless youth to public and private agencies for health care.
5. Providing long term planning, placement, and follow-up services to a runaway or homeless youth.
6. Referring a runaway or homeless youth to any other assistance or services offered by public and private agencies.

*Id.* § 34-30-25-1.

6. *Id.* § 34-30-25-5.

7. *Id.* § 34-30-25-2.

8. 903 N.E.2d 1032 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 546 (Ind. 2009).

9. *Id.* at 1041.

10. *Id.* at 1035.

11. *Id.* at 1036.

12. *Id.*

13. *Id.* at 1040-41.

14. *Id.* at 1038.



the injured person; and (3) concerns of public policy.<sup>15</sup>

The Indiana Supreme Court in *Gariup* explained that, as between an employer, an employee, and third-person motorists potentially “exposed to significant danger in the event of [the employee’s] drunk driving, there existed a relationship which as a matter of law gave rise to a duty on the part of [the employer] to exercise ordinary and reasonable care.”<sup>16</sup>

First, the court could not find that a relationship existed because Dibble was an independent contractor instead of an employee, “and therefore, was not under K&P’s influence and control as contemplated by *Gariup*.”<sup>17</sup> The court then found that “K&P did not in any way contribute to Dibble’s impairment, where Dibble had been drinking on his own the night before the tournament and had taken a ‘prescription medication prior to the tournament.’”<sup>18</sup>

The court reasoned that the “foreseeability component of duty requires . . . a general analysis of the broad type of plaintiff and harm involved, without regard to the facts of the actual occurrence.”<sup>19</sup> The court found that it was not reasonably foreseeable for an individual, in Dibble’s circumstances on the day in question, to cause an automobile accident.<sup>20</sup>

The court concluded by reasoning that factors including “convenience of administration, capacity of the parties to bear the loss, a policy of preventing future injuries, and the moral blame attached to the wrongdoer,”<sup>21</sup> are all weighed in a public policy decision to determine the existence of a duty. The court held that although society has a legitimate interest in protecting its citizens from seriously impaired drivers, the demands that the drivers bear responsibility for their own negligent driving outweigh such an interest.<sup>22</sup>

In *Witmat Development Corp. v. Dickison*,<sup>23</sup> the Indiana Court of Appeals reversed the trial court’s grant of summary judgment in favor of the defendants involving the question of whether the intoxicated plaintiff (Dickison), whose vehicle struck a tree and fell into a water filled strip pit, was owed a duty by the property owner, Witmat.<sup>24</sup> The court explained that Dickison’s estate must demonstrate that (1) Witmat owed Dickison a duty; (2) Witmat breached the duty; and (3) the breach proximately caused Dickison’s death.<sup>25</sup> The court, applied the Webb test to determine whether a duty exists as “(1) the relationship between the parties; (2) the reasonable foreseeability of the harm to the person

---

15. *Id.* (citing *Estate of Heck ex rel. Heck v. Stoffer*, 786 N.E.2d 265, 268 (Ind. 2003)).

16. *Id.* at 1039 (quoting *Gariup Constr. Co. v. Foster*, 519 N.E.2d 1224, 1229 (Ind. 1988)).

17. *Id.*

18. *Id.* at 1039-40.

19. *Id.* at 1040 (quoting *Clark v. Aris, Inc.*, 890 N.E.2d 760, 764 (Ind. Ct. App. 2008)).

20. *Id.*

21. *Id.* (quoting *Williams v. Cingular Wireless*, 809 N.E.2d 473, 478 (Ind. Ct. App. 2004)).

22. *Id.*

23. 907 N.E.2d 170 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 552 (Ind. 2009).

24. *Id.* at 171-72.

25. *Id.* at 173 (citing *Winchell v. Guy*, 857 N.E.2d 1024, 1026 (Ind. Ct. App. 2006)).

injured; and (3) public policy concerns.”<sup>26</sup>

The court found that Witmat owed no duty to Dickison.<sup>27</sup> Although traditionally those who occupy land adjacent to roads and highways have an obligation “to use reasonable care not to endanger such passage by excavations or other hazards so close to the road as to make it unsafe to persons using the road with ordinary care,”<sup>28</sup> Dickison’s failed to exert reasonable care, as his blood alcohol was 0.172 to 0.204 when he died.<sup>29</sup> Also, the plaintiff could not identify any evidence that the accident happened because Dickison overcorrected.<sup>30</sup>

In *Harradon v. Schlamadinger*,<sup>31</sup> the court addressed whether a property owner owes a duty to a two-month old who suffocated while sleeping on the owner’s couch with his mother.<sup>32</sup> The parents sued the defendants, and trial court granted summary judgment in favor of the defendants.<sup>33</sup>

The court held that a landowner is subject to liability for physical harm suffered by his invitees by a condition on the land if he:

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.<sup>34</sup>

The court concluded that the minor plaintiffs, who were seventeen years old at the time of the incident, must exercise the standard of care of adults.<sup>35</sup> The court found that because the baby was entirely dependent on the care of his minor parents, the scope of the defendants’ care was limited to a duty to supervise the plaintiffs.<sup>36</sup> The court also relied on the fact that the baby was in their exclusive care the evening in question.<sup>37</sup>

---

26. *Id.* (citing *Webb v. Jarvis*, 575 N.E.2d 992 (Ind. 1991)).

27. *Id.* at 175.

28. *Id.* (quoting *Ind. Limestone Co. v. Staggs*, 672 N.E.2d 1377, 1381 (Ind. Ct. App. 1996)); see *City of Indianapolis v. Emmelman*, 9 N.E. 155, 157 (Ind. 1886).

29. *Witmat Dev. Corp.*, 907 N.E.2d at 174.

30. *Id.* at 175.

31. 913 N.E.2d 297 (Ind. Ct. App. 2009), *trans. denied*, No. 75A03-0903-CV-114, 2010 Ind. LEXIS 44 (Ind. Jan. 14, 2010).

32. *Id.* at 298-99.

33. *Id.* at 298.

34. *Id.* at 301 (citing *Burrell v. Meads*, 569 N.E.2d 637, 639-40 (Ind. 1991); RESTATEMENT (SECOND) OF TORTS § 343 (1965)). All three of these preconditions must be met before a landowner will be held liable. *Id.*

35. *Id.*

36. *Id.*; see also *Davis v. LeCuyer*, 849 N.E.2d 750, 757 (Ind. Ct. App. 2006).

37. *Harradon*, 913 N.E.2d at 301; see *Kelly v. Ladywood Apartments*, 622 N.E.2d 1044, 1049 (Ind. Ct. App. 1993) (holding that the “immediate presence” of a supervising parent negates



The court also concluded that the Schlamadinger's sofa was not a dangerous condition on the property within the meaning of the Restatement.<sup>38</sup> Also, a sofa is a common household item, not generally presented as an unreasonable risk of harm to a baby.<sup>39</sup> The court held that "[t]he law does not require the [defendants] to protect a youthful invitee, such as the baby, from a danger on their premises which [the parents] themselves created, were fully aware of, and yet consciously disregarded."<sup>40</sup> Due to their exclusive care of the baby, the parents owed a duty to the baby to exercise reasonable care to protect the baby from a condition on the defendant's property.<sup>41</sup>

### *B. Res Ipsa Loquitur*

In *Ziobron v. Squires*,<sup>42</sup> the Indiana Court of Appeals affirmed the trial court's grant of summary judgment for the defendant medical providers in a case involving alleged malpractice cause during a vaginal hysterectomy with removal of ovaries and fallopian tubes and a bladder sling procedure.<sup>43</sup>

The court explained that, under the doctrine of *res ipsa loquitur*, negligence may be inferred where: "1) the injuring instrumentality is shown to be under the management or exclusive control of the defendant or his servants, and 2) the accident is such as in the ordinary course of things does not happen if those who have management of the injuring instrumentality use proper care."<sup>44</sup>

A physician's alleged negligence may be so apparent that, due to *res ipsa loquitur*, expert testimony is unnecessary to raise a genuine issue of material fact.<sup>45</sup> But the physician's care must be so "obviously substandard" that a layperson could recognize it.<sup>46</sup> The court concluded that, in addition to the plaintiff's failure to provide sufficient evidence, preparation for the bladder sling procedure, and the likelihood of symptoms following it developing five years afterwards, fell outside of the realm of negligible conduct inferable by a layperson under Indiana precedent.<sup>47</sup>

---

"the policy reasons for shifting the duty of care for a child from" the parent to a third party).

38. *Harradon*, 913 N.E.2d at 302 (Ind. Ct. App. 2009); *see also* RESTATEMENT (SECOND) OF TORTS § 343(a) (1965).

39. *Harradon*, 913 N.E.2d at 302 (citing *Lowden v. Lowden*, 490 N.E.2d 1143, 1146-47 (Ind. Ct. App. 1986)).

40. *Id.* (citing *Johnson v. Pettigrew*, 595 N.E.2d 747, 752 (Ind. Ct. App. 1992)).

41. *Id.*

42. 907 N.E.2d 118 (Ind. Ct. App. 2008). Although this is a medical malpractice case, this has been included in the survey due to its discussion *res ipsa loquitur*.

43. *Id.* at 120.

44. *Id.* at 125 (citing *Syfu v. Quinn*, 826 N.E.2d 699, 704 (Ind. Ct. App. 2005)).

45. *Id.* at 123 (citing *Syfu*, 826 N.E.2d at 703; *Wright v. Carter*, 622 N.E.2d 170, 171 (Ind. 1993)).

46. *Id.* (quoting *Malooley v. McIntyre*, 597 N.E.2d 314, 319 (Ind. Ct. App. 1992)).

47. *Id.* at 126-27. The court compared Hostetter's bladder sling procedure to a number of cases. *See id.* (citing *Wright v. Carter*, 622 N.E.2d 170, 171 (Ind. 1993) (wiring left in patient's

### C. Negligence Per Se

The Indiana Court of Appeals addressed one case of statutory negligence during the survey period. In *Lindsey v. DeGroot*,<sup>48</sup> the court affirmed the trial court's grant of summary judgment in favor of DeGroot Dairy.<sup>49</sup> Plaintiffs alleged that DeGroot was negligent based on a preliminary injunction (later vacated) issued by the Indiana Department of Environmental Management (IDEM) against DeGroot for manure runoff.<sup>50</sup>

The court restated the broad principle of negligence per se: "statutory negligence is not predicated upon any test for ordinary or reasonable care, but rather is founded in the defendant's violation of a specific requirement of law."<sup>51</sup> The court did note that an "unexcused or unjustified violation" of a statutory duty is negligence per se.<sup>52</sup> But simply committing statutory negligence fails to automatically translate to "liability *per se*."<sup>53</sup> Regardless of an established violation of a statutory duty, no actionable claim arises without first showing proximate cause between the violation and the injury.<sup>54</sup>

The court found that the IDEM preliminary injunction concerned a manure runoff not affecting the Lindseys' land.<sup>55</sup> The court was not convinced that any of DeGroot's alleged or actual 2002 Continued Feeding Operation violations harmed the value of the Lindseys' land as a foreseeable consequence.<sup>56</sup> In fact, the court found that the land value increased despite the violations.<sup>57</sup>

### D. Causation

In *Sparks v. White*,<sup>58</sup> the court addressed whether defendants were entitled to summary judgment based on lack of proximate cause where the plaintiff was

---

body following procedure)); *Ball Mem'l Hospital v. Freeman*, 196 N.E.2d 274 (Ind. 1964) (poison administered into patient); *Funk v. Bonham*, 183 N.E. 312 (Ind. 1932) (sponge left in patient's torso); *Cleary v. Manning*, 884 N.E.2d 335 (Ind. Ct. App. 2008) (patient's oxygen mask ignited from sparks emanating surgical instruments); *Gold v. Ishak*, 720 N.E.2d 1175 (Ind. Ct. App. 1999), *Stumph v. Foster*, 524 N.E.2d 812 (Ind. Ct. App. 1988) (patient's rib broken during chiropractor's attempt to treatment migraine headaches), *Klinger v. Caylor*, 276 N.E.2d 848 (Ind. 1971) (surgical padding left in intestinal tract), *Ciesiolka v. Selby*, 261 N.E.2d 95 (Ind. Ct. App. 1970) (mesh left in patient's torso).

48. 898 N.E.2d 1251 (Ind. Ct. App. 2009).

49. *Id.* at 1265.

50. *Id.* at 1260 & n.3.

51. *Id.* (quoting *Smith v. Cook*, 361 N.E.2d 197, 199 (Ind. App. 1977)).

52. *Id.* (quoting *Town of Montezuma v. Downs*, 685 N.E.2d 108, 112 (Ind. Ct. App. 1997)).

53. *Id.* (citing *Inland Steel v. Pequignot*, 608 N.E.2d 1378, 1383 (Ind. Ct. App. 1993)).

54. *Id.* (citing *Inland Steel*, 608 N.E.2d at 1383).

55. *Id.* at 1260-61.

56. *Id.* at 1261-62.

57. *Id.*

58. 899 N.E.2d 21 (Ind. Ct. App. 2008).



injured after she drove off the road and struck the Sparkeses' mailbox.<sup>59</sup> The Sparkses argued that, even if they owed a duty, they were entitled to summary judgment because they did not proximately cause plaintiff's injuries.<sup>60</sup>

The court noted that proximate cause is a factual issue not properly resolved by summary judgment.<sup>61</sup> The court held that "[a]n act or omission is said to be a proximate cause of an injury if the resulting injury was foreseen, or reasonably should have been foreseen, as the natural and probable consequence of the act or omission."<sup>62</sup> The court also held that "the plaintiff's burden of proof on foreseeability is higher for purposes of proximate cause than for purposes of the duty analysis."<sup>63</sup>

The court concluded that, regardless of the plaintiff's possible violation of her own duty to maintain control of her vehicle, the Sparkses could have foreseen that plaintiff would drive out of her lane, cross oncoming traffic, leave the road and unavoidably hit their mailbox.<sup>64</sup> Moreover, the court concluded that a jury should address the allocation of fault because it is a "real possibility" that the plaintiff was more than fifty percent at fault for her injuries suffered, regardless of the foreseeability.<sup>65</sup> The court concluded that the trial court did not err in denying the plaintiff's motion for summary judgment and reversed and remanded the cause to the trial court.<sup>66</sup>

In *Cook v. Ford Motor Co.*,<sup>67</sup> the court addressed whether the act of a child unbuckling her seatbelt before a vehicular collision was an intervening and superseding cause in the chain of causation.<sup>68</sup> Peter Cook read the page in his 1997 Ford truck manual regarding air bag, but failed to see or read the sun visor warning regarding passenger seating in relation to seat belts and air bags.<sup>69</sup> When the truck was involved in a low-speed rear-end collision,<sup>70</sup> his daughter, Lindsey, was sitting unbuckled in the front passenger seat.<sup>71</sup> When the airbags deployed, Lindsey was injured.<sup>72</sup>

The Cooks sued Ford Motor Co. for failure to warn.<sup>73</sup> The court granted summary judgment for defendants, noting that "[t]he alleged failure to give

---

59. *Id.* at 22.

60. *Id.* at 29.

61. *Id.* (citing *Rhodes v. Wright*, 805 N.E.2d 382, 388 (Ind. 2004); *Hedrick v. Tabbert*, 722 N.E.2d 1269, 1273 (Ind. Ct. App. 2000)).

62. *Id.* (citing *Funson v. Sch. Town of Munster*, 849 N.E.2d 595, 600 (Ind. 2006)).

63. *Id.* at 29-30 (citing *Goldsberry v. Grubbs*, 672 N.E.2d 475, 479 (Ind. Ct. App. 1996)).

64. *Id.* at 29.

65. *Id.* at 30.

66. *Id.*

67. 913 N.E.2d 311 (Ind. Ct. App. 2009), *trans. denied*, 929 N.E.2d 785 (Ind. 2010).

68. *Id.* at 328-31.

69. *Id.* at 316-17.

70. *Id.* at 317.

71. *Id.*

72. *Id.*

73. *Id.*

adequate warnings was not the proximate cause of the harm because [the Cooks] failed to reads the warnings provided.”<sup>74</sup>

The court noted that the defendant’s act or omission only need serve as one proximate cause to the injury, not the only proximate cause.<sup>75</sup> “Proximate cause is primarily a question of fact to be determined by the jury and therefore, ordinarily is not properly resolved on summary judgment.”<sup>76</sup> The court held that “[c]hildren between the ages of seven and fourteen are required to exercise due care for their own safety under the circumstances of a child of like age, knowledge, judgment, and experience and there is a rebuttable presumption they are incapable of negligence.”<sup>77</sup> A reasonably foreseeable intervening act does “not break the chain of causation,” meaning that the first wrongful act may “still be considered the proximate cause of an injury.”<sup>78</sup>

The court concluded that the question of whether Lindsey broke the chain of causation is a jury question.<sup>79</sup> There is no dispute that the Cooks followed the seat belt instructions when they placed Lindsey in the front seat, but Lindsey occasionally unbelted her seat belt in the past and that this time was no different.<sup>80</sup> Because Lindsey was eight years old, there was a rebuttable presumption that she was incapable of negligence.<sup>81</sup> The court held that at best a jury question existed “whether Lindsey failed to exercise the due care required of her for her own safety under these circumstances and, if so, whether her failure was an intervening cause sufficient to break any chain of causation leading back to Ford.”<sup>82</sup>

The court also held that a jury should decide whether the backseat and airbag instructions were an adequate warning to the danger of airbag deployment.<sup>83</sup> The court also found that Lindsey’s injury could have been prevented had the Cooks

---

74. *Id.* at 318.

75. *Id.* at 328 (quoting *Hassan v. Begley*, 836 N.E.2d 303, 307 (Ind. Ct. App. 2005)); *see* IND. CODE § 34-51-2-1 (2009).

76. *Cook*, 913 N.E.2d at 328 (citing *Sparks v. White*, 899 N.E.2d 21, 29 (Ind. Ct. App. 2008)).

77. *Id.* at 329 (citing *Creasy v. Rusk*, 730 N.E.2d 659, 662 (Ind. 2000)).

78. *Id.* (citing *Briesacher v. Specialized Restoration and Constr., Inc.*, 888 N.E.2d 188, 194 (Ind. Ct. App. 2008); *Conder v. Hull Lift Truck, Inc.*, 435 N.E.2d 10, 14 (Ind. 1982) (when an individual, other than the alleged tortfeasor, acts in a way that affects the chain of causation, said act is an intervening cause, breaking the chain of causation if unforeseeable)).

79. *Cook*, 913 N.E.2d at 329-30 (citing *Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104, 107 (Ind. 2002) (foreseeability concerning intervening causes from the original wrongdoer is jury question); *Underly v. Advance Mach. Co.*, 605 N.E.2d 1186, 1189 (Ind. Ct. App. 1993) (foreseeability concerning intervening misuse is a jury question), *superseded by statute as stated in* 790 N.E.2d 1023 (Ind. Ct. App. 2003)).

80. *Id.* at 328-29.

81. *Id.* at 329.

82. *Id.* (citations and footnotes omitted).

83. *Id.* at 330.



placed her in the backseat.<sup>84</sup> While the vehicle instruction told parents in equivocal language to do so “if possible,” they also did not address the role airbags play in affecting the safety of children in the front seat.<sup>85</sup> The court concluded that “Ford failed to negate an element of the Cooks’ failure to warn claim as a matter of law,” rendering summary judgment inappropriate.<sup>86</sup> The court reversed and remanded the case for further proceedings.<sup>87</sup>

In *Foddrill v. Crane*,<sup>88</sup> the court addressed circumstances under which a plaintiff need not present expert testimony in order to establish proximate cause.<sup>89</sup> Plaintiff was injured after being struck in her vehicle while at a traffic light.<sup>90</sup> At trial, the defendant proposed instruction that the jury should not infer negligence from a rear end collision, which the court denied.<sup>91</sup> Moreover, the jury apportioned one-hundred percent fault to defendant.<sup>92</sup> On appeal, defendant claimed that Crane failed to produce sufficient expert testimony to establish that a breach of duty proximately caused her injuries.<sup>93</sup>

The court noted that proximate cause “requires, at a minimum, causation in fact—that is, that the harm would not have occurred ‘but for’ the defendants’ conduct.”<sup>94</sup> Rather than rely on speculation, the plaintiff must “present evidence of probative value based on facts, or inferences to be drawn [therefrom], establishing both that the wrongful act was the cause in fact of the occurrence and that the occurrence was the cause in fact of her injury.”<sup>95</sup>

The court found sufficient evidence of “but-for” causation, as defendant was possibly using his cell phone at the time of the accident.<sup>96</sup> He claimed that it was inoperative.<sup>97</sup> Although, he was seen holding it as he exited the vehicle and later was seen placing calls with it.<sup>98</sup> The court next concluded that no expert testimony was required to show a causal relationship between the accident and Crane’s injuries following the accident.<sup>99</sup> Generally, courts consider plaintiffs competent to testify to an injury that is objective in nature without expert testimony.<sup>100</sup> But “[w]hen the issue of cause is not within the understanding of

---

84. *Id.* at 334.

85. *Id.* at 326-27.

86. *Id.* at 331.

87. *Id.*

88. 894 N.E.2d 1070 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 982 (Ind. 2009).

89. *Id.* at 1077-78.

90. *Id.* at 1074-75.

91. *Id.* at 1075.

92. *Id.*

93. *Id.* at 1077-78.

94. *Id.* at 1077.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1078.

100. *Id.* at 1077.

a lay person, testimony of an expert witness on the issue is necessary.”<sup>101</sup> Although Crane’s physician was unable to definitely say that the collision caused Crane’s injuries, the injuries’ nature were objective “inasmuch as [the physician] was able to detect their physical manifestations.”<sup>102</sup> The court concluded that a layperson could understand the causal connection in the absence of an expert’s help.<sup>103</sup>

In *Kovach v. Caligor Midwest*,<sup>104</sup> the Indiana Supreme Court addressed whether a failure to warn was the proximate cause of the patient’s death.<sup>105</sup> Following surgery, nine-year-old Matthew Kovach was administered acetaminophen with codeine in a medicine cup with a volume a little more than 30 milliliters (mL).<sup>106</sup> The nurse testified that she only administered the 15 mL prescribed for him, but Matthew’s parents claimed that the cup was completely full.<sup>107</sup> Shortly after being discharged, Matthew went into respiratory arrest and died of asphyxia.<sup>108</sup> The Kovachs sued the medicine cup’s distributor and manufacturers.<sup>109</sup>

At trial, the court admitted the affidavit of a pharmacist who found the measuring cup unsuitable for precision measurement and needing an appropriate warning.<sup>110</sup> The trial court eventually granted summary judgment in favor of the defendants.<sup>111</sup> The Indiana Court of Appeals reversed, holding that “(1) the trial court did not abuse its discretion in admitting [the] affidavit,” and (2) a genuine issue of fact precluded the plaintiff’s claims against the defendants.<sup>112</sup> On proximate cause, the court held that “the missing warning is in essence a presumption of causation.”<sup>113</sup>

The supreme court found issue of causation dispositive to all four claims.<sup>114</sup> Issues of causation-in-fact and scope of liability compose proximate cause.<sup>115</sup> The burden is on the plaintiff to show that “but for the defendant’s allegedly tortious act or omission, the injury at issue would not have occurred.”<sup>116</sup> Scope

---

101. *Id.*

102. *Id.* at 1077-78.

103. *Id.*

104. 913 N.E.2d 193 (Ind. 2009).

105. *Id.* at 196-97.

106. *Id.* at 195.

107. *Id.*

108. *Id.*

109. *Id.* at 195-96.

110. *Id.* at 196.

111. *Id.*

112. *Id.*

113. *Id.* (citing *Ortho Pharm. Corp. v. Chapman*, 388 N.E.2d 541, 555 (Ind. App. 1979)).

114. *Id.* at 197; *see also* *Ford Motor Co. v. Rushford*, 868 N.E.2d 806, 810 (Ind. 2007); 63 AM. JUR. 2D *Products Liability* § 724 (1997).

115. *Kovach*, 913 N.E.2d at 197 (citing *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1243-44 (Ind. 2003)).

116. *Id.* at 198 (citing *Smith & Wesson Corp.*, 801 N.E.2d at 1243-44).



of liability requires that the injury be “a natural and probable consequence of the defendant’s conduct, which in the light of the circumstances, should have been foreseen or anticipated.”<sup>117</sup>

On transfer, the Indiana Supreme Court concluded that the undisputed facts failed to establish a causal connection between Matthew’s overdose and the precision-measuring nature of the measuring cup in question.<sup>118</sup> The court first found that Matthew’s death could not be attributed to any alleged defects in the cup itself.<sup>119</sup> It was an undisputed fact that if there was an overdose in this case, it was not caused by an imprecise measurement of medication attributable to any alleged defects in the cup itself.<sup>120</sup> Instead, the accident was due to “an erroneous double dosage of 30 mL of codeine when [he] was only supposed to receive 15 mL.”<sup>121</sup> This precluded any need to address the admissibility of the physician’s expert testimony.<sup>122</sup> The undisputed fact that the cup at issue could result in a twenty to thirty percent margin of error fails to account for the one hundred percent error in codeine administration.<sup>123</sup>

The Indiana Supreme Court also distinguished the application of the *Ortho* rule from the court of appeals in disposing of the failure-to-warn claim.<sup>124</sup> The court noted that the *Ortho* rule, which holds that a missing warning would have been read and obeyed had it been present,<sup>125</sup> ignores the reality that “[t]he plaintiff invoking the presumption must still show that the danger would have been prevented by an appropriate warning was the danger that materialized in the plaintiff’s case.”<sup>126</sup> In this case, even if the *Ortho* rule were applied, and a nurse would have read a warning that the cup were not designed for precision measurement, the court would have to conclude that Matthew’s cause of death was the result of imprecise measurement, which is already established not to be the case.<sup>127</sup> The court unanimously concluded that the Defendants had established that the cup’s alleged defects had not caused Matthew’s death and affirmed the trial court’s grant of summary judgment in their favor.<sup>128</sup>

---

117. *Id.* (citing *Smith & Wesson Corp.*, 801 N.E.2d at 1244).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 199.

125. *Id.* (citing *Ortho Pharm. Corp. v. Chapman*, 388 N.E.2d 541, 555 (Ind. App. 1979)).

126. *Id.* Compare *Ortho Pharm. Corp.*, 388 N.E.2d at 555; *Nissen Trampoline Co. v. Terre Haute First Nat’l Bank*, 332 N.E.2d 820, 826-27 (Ind. Ct. App. 1975), *rev’d on procedural grounds*, 358 N.E.2d 974 (1976), with 2 DAN B. DOBBS, *THE LAW OF TORTS* § 367 (2001) and 1 DAVID G. OWEN ET AL., *MADDEN & OWEN ON PRODUCTS LIABILITY* § 9:11 (3d ed. 2000).

127. *Kovach*, 913 N.E.2d at 199.

128. *Id.* at 200.

### *E. Infliction of Emotional Distress*

In *Lindsey v. DeGroot*,<sup>129</sup> the court addressed an alleged and intentional trespass of Lindsey's disputed property by a DeGroot employee and intentional infliction of emotional distress.<sup>130</sup> This portion of the Article discusses Lindsey's intentional infliction of emotional distress claim.

Intentional infliction of emotional distress is defined as one who: "(1) [e]ngages in extreme and outrageous conduct (2) [w]hich intentionally or recklessly (3) [c]auses (4) [s]evere emotional distress to another."<sup>131</sup>

In affirming summary judgment, the court concluded that DeGroot's actions did not constitute "outrageous" behavior as contemplated under law.<sup>132</sup> DeGroot's dairy farm operated largely within Indiana regulations, and their activity was not extreme, atrocious, and intolerable beyond all possible bounds of decency.<sup>133</sup> The court also could not find evidence that DeGroot intended to cause emotional distress.<sup>134</sup>

### *F. Assumption of Risk*

In *Spar v. Cha*,<sup>135</sup> the Indiana Supreme Court held that, among other things, "incurred risk is not a defense to medical malpractice based on negligence or lack of informed consent."<sup>136</sup> Brenda Spar suffered complications arising from a laparoscopic surgery to repair a perforated bowel and Spar sued.<sup>137</sup> Following a jury verdict in favor of the defendant, Spar appealed.<sup>138</sup> The court of appeals reversed and remanded, holding that "except where a patient has disregarded her physician's instructions, incurred risk is not a defense to claims of lack of informed consent or negligent performance of a medical procedure."<sup>139</sup>

The court has defined the largely obsolete defense of "incurred risk" or "assumption of risk" in four ways:

1. "Express," in which "the plaintiff has given his express consent to relieve the defendant of an obligation to exercise care . . . , and agrees to take his chances as to injury from a known or possible risk."
2. "Implied primary," in which "the plaintiff has entered voluntarily into some relation with the defendant which he knows to involve the risk,"

---

129. 898 N.E.2d 1251 (Ind. Ct. App. 2009).

130. *Id.* at 1256.

131. *Id.* at 1264 (citing *Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind. 1991)); *see also* *Bradley v. Hall*, 720 N.E.2d 747, 752-53 (Ind. Ct. App. 1999).

132. *Lindsey*, 898 N.E.2d at 1264-65.

133. *Id.*

134. *Id.* at 1265.

135. 907 N.E.2d 974 (Ind. 2009).

136. *Id.* at 976.

137. *Id.* at 976-78.

138. *Id.* at 979.

139. *Id.* (citing *Spar v. Cha*, 881 N.E.2d 70, 70, 74-75 (Ind. Ct. App. 2008)).



and is deemed to have impliedly agreed to relieve the defendant of responsibility, and to take his own chances. A spectator at a baseball game consents to the game's proceeding without precautions to protect from being hit by the ball.

3. "Implied secondary," in which "the plaintiff, aware of a risk created by the negligence of the defendant, proceeds or continues voluntarily to encounter it." An example is an independent contractor who knows that he has been furnished by his principal with a machine in dangerous condition but reasonably continues to work with it.

4. "Unreasonable," in which the plaintiff's conduct in voluntarily encountering a known risk is itself unreasonable, and amounts to contributory negligence.<sup>140</sup>

Express or implied "consent must be based on actual knowledge of the risk, not merely 'general awareness of a potential for mishap.'"<sup>141</sup> Implied assumption of the risk is an affirmative defense that relieves a defendant of the duty of care concerning negligence.<sup>142</sup> They may not require an affirmative defense pleading under Trial Rule 8, "because they negate an element of the claim," and the burden is on the defendant.<sup>143</sup> But implied secondary assumption of risk fails to "negate the defendant's duty or breach."<sup>144</sup>

In affirming the court of appeals, the Indiana Supreme Court agreed with the court of appeals' conclusion that "assumption of risk—whether in the express, primary, or secondary sense—has little legitimate application in the medical malpractice context."<sup>145</sup> The court held that "the disparity in knowledge between professionals and their clientele generally precludes recipients of professional services from knowing whether a professional's conduct is in fact negligent."<sup>146</sup> Thus, "there is virtually no scenario in which a patient can consent to allow a healthcare provider to exercise less than 'ordinary care.'"<sup>147</sup> Even if the defense

---

140. *Id.* at 979-80 (quoting RESTATEMENT (SECOND) OF TORTS § 496A cmt. c (1965)); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68, at 480-81, 496-97.

141. *Spar*, 907 N.E.2d at 981 (quoting *Clerk v. Wiegand*, 617 N.E.2d 916, 918 (Ind. 1993); *Beckett v. Clinton Prairie Sch. Corp.*, 504 N.E.2d 552, 554 (Ind. 1987)).

142. *Id.*; *see also* *Get-N-Go, Inc. v. Markins*, 544 N.E.2d 484, 486 (Ind. 1989); KEETON ET AL., *supra* note 140, § 68, at 480-81.

143. *Spar*, 907 N.E.2d at 981; *see also* RESTATEMENT (SECOND) OF TORTS § 496G cmt. c ("Assumption of risk . . . comes into question only where there would otherwise be a breach of some duty owed by the defendant to the plaintiff. It is then a defense, which relieves the defendant of the liability to which he would otherwise be subject. The burden of proof is therefore upon the defendant."); DAN B. DOBBS, THE LAW OF TORTS, § 250 (2001) (footnotes omitted).

144. *Spar*, 907 N.E.2d at 981; *see also* *Richardson v. Marrell's, Inc.*, 539 N.E.2d 485, 486 (Ind. Ct. App. 1989), *trans. denied* (Nov. 7, 1989).

145. *Spar*, 907 N.E.2d at 982.

146. *Id.* (quoting *Morrison v. MacNamara*, 407 A.2d 555, 567 (D.C. 1979) (citations omitted); *accord* *Smith v. Hull*, 659 N.E.2d 185, 194 n.6 (Ind. Ct. App. 1995)).

147. *Id.* (quoting *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 884 (Del. Super. Ct.

were available, the court could not find any evidence that Spar “incurred the risk of negligent care.”<sup>148</sup>

The court concluded that assumption of the risk was not a defense to Spar’s claim that she lacked informed consent.<sup>149</sup> A patient may waive the right to be informed, but the physician does not need to make a disclosure if the patient has requested as much.<sup>150</sup> A patient who waives informed consent assumes only the risks associated with nondisclosure. Here, the court found no evidence that “Spar waived her right to informed consent or otherwise assumed the risks related to negligent nondisclosure disclosure.”<sup>151</sup>

### G. Rescue Doctrine

In *Franciose v. Jones*,<sup>152</sup> the court of appeals affirmed the Porter County Superior Court’s entry of judgment against Ray Ramirez, III and Mark P. Franciose.<sup>153</sup> Ramirez lost control of his truck in snowy weather, crashed into the interstate guardrails, and was stuck in the passing lane.<sup>154</sup> A traffic jam formed around the accident.<sup>155</sup> Franciose’s vehicle approach the traffic jam and hit Ramirez’s passenger, Aaron A. Jones, as Jones attempted to push the stranded truck off the interstate.<sup>156</sup> Jones sued Ramirez and Franciose claiming that they acted negligently and injured him.<sup>157</sup> On appeal, the defendants claimed that the trial court erred in rendering the following jury instruction:

A rescuer is one who undertakes physical activity in a reasonable attempt to rescue persons or property from imminent peril. The rescue doctrine is designed to encourage and reward humanitarian acts. If you fin[d] that Aaron Jones attempted to move the disabled vehicle off the roadway in a reasonable attempt to prevent further harm, then you may find that his actions were both reasonable and foreseeable as to Ray Ramirez.<sup>158</sup>

Among the six issues raised on appeal by the defendants, this Article addresses

---

2005)). The Indiana Supreme Court did not agree with the court of appeals’ conclusion that failure to follow instruction of a healthcare provider is the only exception; however, the court does not address other circumstances where the defense would apply. *Id.* & n.2.

148. *Id.* at 983.

149. *Id.*

150. *Id.*; see, e.g., DEL. CODE ANN. tit. 18, § 6852(b)(2) (2006); IND. CODE § 34-18-12-8; *Arato v. Avedon*, 858 P.2d 598, 609 (Cal. 1993); *Holt v. Nelson*, 523 P.2d 211, 219 (Wash. App. 1974).

151. *Spar*, 907 N.E.2d at 983.

152. 907 N.E.2d 139 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 558 (Ind. 2009).

153. *Id.* at 142.

154. *Id.*

155. *Id.*

156. *Id.* at 142-43.

157. *Id.*

158. *Id.* at 152 (citing Tr. Vol. IV p. 223-24).



whether the trial court erred in its jury instruction concerning the rescue doctrine.<sup>159</sup>

The court recited the Indiana Supreme Court's adopted version of the rescue doctrine, "which is a rule that '[o]ne who has, through his negligence, endangered the safety of another may be held liable for injuries sustained by a third person in attempting to save such other from injury.'" <sup>160</sup> The doctrine was intended to "encourage and reward humanitarian acts."<sup>161</sup> In order for a defendant to be liable, the injured third party "must actually act to rescue someone who is endangered by the defendant's actions."<sup>162</sup> A rescuer is defined by the court as "one who actually undertakes physical activity in a reasonable and prudent attempt to rescue."<sup>163</sup>

In affirming the trial court's entry of judgment, the court first concluded that the designated evidence supports the instruction.<sup>164</sup> The court found Jones had acted out of concern "*for the safety of others*."<sup>165</sup> The court found that "[t]he passage of a short amount of time from the initial accident does not mean that the peril created by the accident dissipated or that the continuity between the commission of the wrong and the effort to avert its consequences was broken."<sup>166</sup> Furthermore, Jones's actions comports with the public policy surrounding the doctrine, which encourages "Good Samaritan efforts."<sup>167</sup>

The court further concluded that the jury instruction is a correct statement of the law.<sup>168</sup> The court read the instruction as properly leaving to the jury the question of whether Jones acted reasonably during the accident, instead of shifting the burden of proof to Ramirez<sup>169</sup>

The court finally concluded that the instruction did not substantially affect Ramirez's right when it informed the jury that he could be held liable for Jones' injuries if Jones acted to protect *property* from imminent peril.<sup>170</sup> Even when a jury is given an incorrect instruction on the law, reversal will not occur unless the party seeking a new trial shows a reasonable probability that substantial rights of the complaining party or the results of the proceeding have been adversely affected.<sup>171</sup> Given the "ample evidence that Jones acted in an attempt to rescue

---

159. *Id.* at 143.

160. *Id.* at 151 (citing *Neal v. Home Builders, Inc.*, 111 N.E.2d 280, 284 (Ind. 1953) (citation omitted), *reh'g denied*).

161. *Id.* at 152 (citing *Heck v. Robey*, 659 N.E.2d 498, 502 (Ind. 1995), *abrogated on other grounds by* *Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104 (Ind. 2002)).

162. *Id.*

163. *Id.* (citing *Lambert v. Parrish*, 492 N.E.2d 289, 291 (Ind. 1986)).

164. *Id.* at 154.

165. *Id.* at 152 (citing Tr. Vol. II p. 214).

166. *Id.* at 152-53.

167. *Id.* at 153.

168. *Id.* at 154.

169. *Id.* at 153-54.

170. *Id.* at 154.

171. *Id.*; *see also* *Penn Harris Madison Sch. Corp. v. Howard*, 861 N.E.2d 1190, 1195 (Ind.

human life—that is, the lives of approaching motorists,” in addition to the fact that the instruction defines a rescuer as one who attempts to rescue “persons or property from imminent peril,” the court could not say that Ramirez’s substantial rights were affected.<sup>172</sup>

### III. LEGAL MALPRACTICE

In *In re Recker*,<sup>173</sup> the Indiana Supreme Court addressed whether two attorneys who shared office space and had access to each other’s files could ethical represent two clients in related matters.<sup>174</sup> James R. Recker and Laura Paul were court-appointed to represent “AB” in a Child in Need of Services case and “XY” in a criminal case, respectively.<sup>175</sup> Both Respondent and Paul shared an office in adjoining cubicles with limited amenities arranged by the county in the public defender’s office.<sup>176</sup> XY and AB shared a prison cell.<sup>177</sup>

The prosecutor in AB’s case approached Paul concerning a possible deal for XY in exchange for information about AB’s alleged battery.<sup>178</sup> Paul, not knowing Recker represented AB, informed Recker of the potential deal, revealing AB’s name but not XY’s name.<sup>179</sup> Recker then called James Holder, a private attorney handling a separate matter for AB, and informed him that AB was talking to cellmates concerning his case.<sup>180</sup> Holder suspected XY as the informant.<sup>181</sup> The prosecutor eventually learned of the situation and separated XY and AB.<sup>182</sup> The State charged and convicted AB of murder, and XY testified at his trial.<sup>183</sup>

The Indiana Disciplinary Commission (“Commission”) filed a verified complaint charging Recker with violating 1.6(a), 1.8(b), and 1.8(k) of the Indiana Rules of Professional Conduct.<sup>184</sup> After a hearing officer found that Recker did not engage in misconduct, the Commission filed a petition for review by the court.<sup>185</sup>

A “firm” or “law firm” is defined as “a lawyer or lawyers in a law

---

2007) (quoting *Elmer Buchta Trucking, Inc. v. Stanley*, 744 N.E.2d 939, 944 (Ind. 2001)); *Wallace v. Rosen*, 765 N.E.2d 192, 196 (Ind. Ct. App. 2002).

172. *Franciose*, 907 N.E.2d at 154.

173. *In re Recker*, 902 N.E.2d 225 (Ind. 2009).

174. *Id.* at 226.

175. *Id.*

176. *Id.*

177. *Id.* at 226-27.

178. *Id.* at 227.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*



partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.”<sup>186</sup> “[T]wo practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm.”<sup>187</sup> But “if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as such, then they should be regarded as a firm.”<sup>188</sup> Mutual access to client information is an important factor to weigh in determining firm status or not.<sup>189</sup>

The court concluded that Recker and Paul’s office-sharing arrangement did not constitute a firm.<sup>190</sup> Although their common space, staff, letterhead, and phone line might suggest a firm, the Putnam County courts and not the attorneys arranged the office.<sup>191</sup> The attorneys did not hold themselves out for business to the public at the arranged office; instead, the two used their office exclusively for court-assigned cases.<sup>192</sup>

In *Harris v. Denning*,<sup>193</sup> the Indiana Court of Appeals affirmed the trial court’s grant of summary judgment on Thomas P. Harris’ suit against Richard Denning and the Indiana Public Defender, Susan K. Carpenter, on claims of deceit, collusion, fraud, and misrepresentation.<sup>194</sup> Denning was a deputy public defender who represented Harris in a petition for post-conviction relief (PCR) on two counts of murder in 1993.<sup>195</sup> In support of his PCR claims, Harris asked Denning to order his probable cause hearing’s transcript, but for over a year and a half, Denning indicated to Harris repeatedly that he had made the order.<sup>196</sup>

Denning and the Public Defender’s Merit Review Committee investigated Harris’s PCR claims and concluded that they lacked merit.<sup>197</sup> Denning stopped representing Harris as mandated by Indiana Post Conviction Rule 1(9)(c), but Denning had yet to receive the transcript.<sup>198</sup> Harris subsequently filed suit pro se against Carpenter and Denning, and the trial court entered summary judgment in favor of Denning and Carpenter.<sup>199</sup>

In affirming summary judgment in favor of Carpenter and Denning, the court

---

186. *Id.* (quoting IND. PROF. CONDUCT R. 1.0).

187. *Id.* (citing IND. PROF. CONDUCT R. 1.0 cmt. 2).

188. *Id.* (citing IND. PROF. CONDUCT R. 1.0 cmt. 2).

189. *Id.* at 227-28 (citing IND. PROF. CONDUCT R. 1.0 cmt. 2).

190. *Id.* at 229.

191. *Id.*

192. *Id.*

193. 900 N.E.2d 765 (Ind. Ct. App. 2009).

194. *Id.* at 766.

195. *Id.* at 766-67.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 767-78.

concluded that respondeat superior cannot apply to Carpenter.<sup>200</sup> “[A] public defender cannot be held liable for the professional malpractice of her deputies.”<sup>201</sup> Carpenter, as public defender, could not interfere in any deputy public defender’s relationship with a client by controlling the decisions that the deputy made in the exercise of his professional judgment.<sup>202</sup> Therefore, any liability attributed to Denning could not extend to Carpenter.<sup>203</sup> Furthermore, the court affirmed summary judgment in favor of Denning “because Harris failed to establish any injury or damages as a result of Denning’s alleged deceit, fraud, or failure to obtain the transcript of the probable cause hearing.”<sup>204</sup>

#### IV. DAMAGES

##### *A. Collateral Source Rule: Reasonable Value of Medical Services*

In *Stanley v. Walker*,<sup>205</sup> the Indiana Supreme Court, in a 3-2 decision, affirmed and remanded the trial court’s award of \$70,000 in damages, with reductions, to plaintiff in an automobile accident suit following the trial court’s

200. *Id.* at 768.

201. *Id.* (quoting *Diaz v. Carpenter*, 650 N.E.2d 688, 691 (Ind. Ct. App. 1995)).

202. *Id.*

203. *Id.*

204. *Id.* at 769.

205. 906 N.E.2d 852 (Ind. 2009). The Indiana General Assembly attempted to reject the Supreme Court’s opinion. House Bill 1255 passed the House of Representatives 57-40, but it died in the Senate Judiciary Committee. H.B. 1255 provides as follows:

In a personal injury or wrongful death action, the court shall allow the admission into evidence of:

(1) proof of collateral source payments other than:

(A) payments of life insurance or other death benefits;

(B) insurance benefits for which the plaintiff or members of the plaintiff’s family have paid for directly;

(C) payments made by:

(i) the state or the United States; or

(ii) any agency, instrumentality, or subdivision of the state or the United States;

that have been made before trial to a plaintiff as compensation for the loss or injury for which the action is brought; or

(D) a writeoff, discount, or other deduction associated with a collateral source payment.

(2) proof of the amount of money that the plaintiff is required to repay, including worker’s compensation benefits, as a result of the collateral benefits received; and

(3) proof of the cost to the plaintiff or to members of the plaintiff’s family of collateral benefits received by the plaintiff or the plaintiff’s family.

It should be noted that these legislative actions fall outside of this article’s survey period.



denial of defendant's request to admit evidence of plaintiff's discounted medical bills.<sup>206</sup> Plaintiff introduced original medical bills during trial that totaled at \$11,570, but those bills did not reveal \$4750 in discounts bargained between plaintiff's medical service providers and his insurer.<sup>207</sup> Defendant subsequently sought to admit the Discount Rate into evidence, "complete with an offer of proof," and plaintiff objected on the grounds that such an admission would violate the Indiana collateral source statute.<sup>208</sup> The trial court agreed with plaintiff, holding that "'anything flowing from the insurance benefit purchased by the plaintiff . . . ' would thus be prohibited under the collateral source statute," including Discount Rates.<sup>209</sup>

The court explained the development of the modern day iteration of the collateral source statute. At common law, the collateral source rule prevented defendants from admitting evidence of compensation received by claimants from sources excluding the defendant, to reduce damage awards.<sup>210</sup> This left liable defendants responsible for the entirety of the consequences of their conduct no matter what secondary compensation plaintiffs may have acquired through first-party insurers, agreements, or gratuity.<sup>211</sup> The General Assembly abrogated the common law rule when it passed the collateral source statute in order to permit evidence of collateral source payments with the exception of specified exceptions.<sup>212</sup>

The collateral source statute's purpose is "to determine the actual amount of

---

206. *Stanley*, 906 N.E.2d at 859. The court did remand the case back to the trial court and reduced their original award for damages by \$4750; however, it left the door open for retrial should plaintiff seek it. *Id.*

207. *Id.* at 854. This means that plaintiff's medical providers were only paid \$6820 from his insurance company ("Discount Rate"), which represents the \$11570 minus the Discount Rate of \$4750. *Id.*

208. *Id.*; see also IND. CODE § 34-44-1-2.

209. *Stanley*, 906 N.E.2d at 854.

210. *Id.*

211. *Id.* (citing *Shirley v. Russell*, 663 N.E.2d 532, 534 (Ind.1996); *Shirley v. Russell*, 69 F.3d 839, 842 (7th Cir.1995)).

212. *Id.* at 854-55. The modern collateral source statute provides:

In a personal injury or wrongful death action, the court shall allow the admission into evidence of:

(1) proof of collateral source payments other than:

(A) payments of life insurance or other death benefits;

(B) insurance benefits for which the plaintiff or members of the plaintiff's family have paid for directly; or

(C) payments made by:

(i) the state or the United States; or

(ii) any agency, instrumentality, or subdivision of the state or the United States; that have been made before trial to a plaintiff as compensation for the loss or injury for which the action is brought[.]

IND. CODE § 34-44-1-2.

the prevailing party's pecuniary loss and to preclude that party from recovering more than once from all applicable sources for each item of loss sustained in a personal injury or wrongful death action."<sup>213</sup> Simultaneously, the statute preserves the common law rule "that collateral source payments should not reduce a damage award if they resulted from the victim's own foresight-both insurance purchased by the victim and also government benefits-presumably because the victim has paid for those benefits through taxes."<sup>214</sup>

The court held that concluded that courts must use the reasonable value of medical services in determining damages to injured parties.<sup>215</sup> The court determined that the fairest approach would be to make the defendant liable for a reasonable value for medical services, independent of the original bill.<sup>216</sup> The court explained that in order for juries to determine reasonable value, they might require, among other things, "the amount of the payments, amounts billed by medical service providers, and other relevant and admissible evidence to be able to determine the amount of reasonable medical expenses."<sup>217</sup>

The court concluded that the collateral source statute could not bar evidence of Discount Rates to determine the reasonable value of medical services.<sup>218</sup> The court held that when the reasonable value of medical services is in dispute, "[t]he opposing party may produce contradictory evidence to challenge to reasonableness of the proffered medical bills, including expert testimony."<sup>219</sup> While not dispositive, the bill actually paid comports with reasonableness of medical expenses and services.<sup>220</sup> The court found that the trial court "should have also referred to the discounted amount actually paid" when it found that "Statements of charges for medical, hospital or other health care expenses for diagnosis or treatment occasioned by an injury constitute prima [facie] evidence that the charges are reasonable and fair."<sup>221</sup>

### *B. Excessive Punitive Damages*

In *Clark v. Simbeck*,<sup>222</sup> the court of appeals examined a trial court's award of \$738,500 compensatory and \$60,000 punitive damages to a victim, who was kicked in the head between thirty to fifty times causing severe injuries to his face

---

213. *Stanley*, 906 N.E.2d at 855; see also IND. CODE § 34-44-1-1(1)-(2).

214. *Stanley*, 906 N.E.2d at 855.

215. *Id.* at 858.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 856. Compare IND. R. EVID. 413, with *Cook v. Whitsell-Sherman*, 796 N.E.2d 271, 277 (Ind. 2003).

220. *Stanley*, 906 N.E.2d at 856; see also *Smith v. Syd's, Inc.*, 598 N.E.2d 1065, 1066 (Ind. 1992).

221. *Stanley*, 906 N.E.2d at 859.

222. 895 N.E.2d 315 (Ind. Ct. App. 2008).



and head.<sup>223</sup>

The victims of a brutal battery sued the defendants civilly following the batterers' convictions.<sup>224</sup> The batterers, who were without counsel, waived liability at the court's suggestion, resulting in a waiver of a jury trial.<sup>225</sup> At the conclusion of the bench trial, the court granted judgment and money damages in favor of the Simbecks.<sup>226</sup> Of the four issues the court addressed on appeal, the court focused on whether the trial court erred in ordering defendants to pay punitive damages to each of the plaintiffs.<sup>227</sup>

Punitive damage awards are reviewed de novo.<sup>228</sup> The Indiana Supreme Court held that "a defendant's financial condition and ability must be considered when such an award is made."<sup>229</sup> The court reasoned:

An award that not only hurts but permanently cripples the defendant goes too far. A life of financial hopelessness may be an invitation to a life of crime. Perpetual inability to get the financial burden of a judgment off his back leaves a defendant with few alternatives. . . . [A] staggering punitive damages award is not merely a useless act. It also traps the plaintiff and defendant forever in a creditor-debtor relationship that offers little if any financial reward to the plaintiff and seems far more likely to lead to nothing but travail for both.<sup>230</sup>

The court concluded that the trial court's award of punitive damages was excessive.<sup>231</sup> The evidence presented to the court indicated that neither defendant had significant assets.<sup>232</sup> Clark's job paid \$13.00 an hour and Biddle apparently had no income.<sup>233</sup> In dissent, Chief Judge Baker, acknowledged the *Stroud* rule, but believed that defendant's conduct in question was "so egregious, so malicious, and so brutal that the relatively nominal punitive damages award of \$60,000 [was] warranted."<sup>234</sup>

---

223. *Id.* at 317.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 320 (citing *Stroud v. Lints*, 790 N.E.2d 440, 443 (Ind. 2003)).

229. *Id.* (citing *Stroud*, 790 N.E.2d at 446-47).

230. *Id.* at 320-01 (citing *Stroud*, 790 N.E.2d at 446).

231. *Id.*; see also IND. CODE § 34-52-2-1 (2008); *Becker v. Fisher*, 852 N.E.2d 46, 48 (Ind. Ct. App. 2006); *Coffman v. Rohrman*, 811 N.E.2d 868, 872-73 (Ind. Ct. App. 2004).

232. *Clark*, 895 N.E.2d at 321.

233. *Id.*

234. *Id.* (Baker, C.J., dissenting).

## V. PREMISES LIABILITY

*A. Possessors of Land*

The Indiana Supreme Court addressed a matter of first impression in *Jackson v. Scheible*.<sup>235</sup> In *Jackson*, the court addressed the question of “under what circumstances a vendor of land may be liable to a third party for harm resulting from the condition of trees on the land near a highway.”<sup>236</sup> Travis Scheible was struck and killed by an oncoming car as he attempted to cross the street from behind a mature tree overhanging a sidewalk.<sup>237</sup> The tree was on property owned by Ronald Smith, who purchased it from Fred Jackson and his wife nearly six months before the accident.<sup>238</sup>

Travis’ mother, Christine Scheible brought a wrongful death action against the former and current owners of the property on which the tree was located.<sup>239</sup> The trial court granted summary judgment in favor of the Jacksons without issuing an opinion,” but the court of appeals reversed, holding that “a vendor may be liable for harm caused by the condition of sold property if the vendor retains control of the property.”<sup>240</sup>

Both parties relied on the Restatement rule that “[a] possessor of land in an urban area is subject to liability to persons using a public highway for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway.”<sup>241</sup> The court adopted the Restatement definition of “possessor” as “a person who is in occupation of the land with intent to control it.”<sup>242</sup> The court noted that a common theme throughout premises liability is “actual control over the condition causing the injury” is a common theme throughout premises liability cases.<sup>243</sup> Also, “a vendor in a land-sale contract will have no liability under [Restatement] section 363 because the vendor no longer occupies or controls the condition of the property,” regardless of who retains legal title as security.<sup>244</sup>

In affirming the trial court’s grant of summary judgment, the court concluded that as a matter of law, Smith was liable as possessor of the land under section

---

235. 902 N.E.2d 807 (Ind. 2009).

236. *Id.* at 810.

237. *Id.* at 809.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 810 (citing RESTATEMENT (SECOND) OF TORTS § 363(2) (1965) as adopted in *Valinet v. Eskew*, 574 N.E.2d 283, 285 (Ind. 1991)).

242. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 328E(a) (1965)).

243. *Id.* (citing *Risk v. Schilling*, 569 N.E.2d 646, 647-48 (Ind. 1991); *Olds v. Noel*, 857 N.E.2d 1044, 1046 (Ind. Ct. App. 2006); *Harris v. Traini*, 759 N.E.2d 215, 225 & n.11 (Ind. Ct. App. 2001)).

244. *Id.* (citing *Skendzel v. Marshall*, 301 N.E.2d 641, 646 (Ind. 1973)).



343, regardless of Fred's retention of equity.<sup>245</sup> The plaintiff acknowledged that vendors generally have no post-sale liability, but argued that this does not apply to Fred because he continued to act like a landowner following the sale.<sup>246</sup> But the court concluded that evidence in support of Fred's landowner status instead evinced a "keen interest in the maintenance of the Property," which "does not translate into his control over the property."<sup>247</sup>

### *B. Proportional Fault*

In *Cox v. Matthews*,<sup>248</sup> the Indiana Court of Appeals affirmed a suit for damages including a jury assessment of proportional fault.<sup>249</sup> Plaintiff Alan Matthews was injured when a loader, operated by the defendant Larry Cox, drove into him and crushed him.<sup>250</sup> Defendant-contractor, Tube City, LLC employed Cox.<sup>251</sup> Following a jury trial in the Lake County Superior Court, the jury assessed no fault against Matthew's employer, Beta Steel, 5.83% against Matthews, and 94.17% of fault against Tube City.<sup>252</sup> Tube City maintained that the percentages of fault were "clearly against the weight of the evidence."<sup>253</sup>

The court in affirming the judgment and the jury assessment.<sup>254</sup> "The process by which a jury analyzes the evidence, reconciles the views of its members, and reaches a unanimous decision is inherently subjective and is entitled to maximum deference."<sup>255</sup> In this case, Tube City conceded during its opening statement that a contract existed between Cox and Matthews.<sup>256</sup> Additionally, "evidence indicated that the backup alarm on the front loader that Cox was operating was not functioning properly."<sup>257</sup>

### *C. Obvious Dangers*

In *Smith v. King*,<sup>258</sup> the Indiana Court of Appeals addressed whether the trial court erred when it found that homeowners did not owe a duty to a contractor who fell through an uncovered opening in their unfinished home.<sup>259</sup> Jeffery

---

245. *Id.* at 812.

246. *Id.* at 811.

247. *Id.* at 812.

248. *Cox v. Matthews*, 901 N.E.2d 14 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 995 (Ind. 2009).

249. *Id.* at 24.

250. *Id.* at 17.

251. *Id.*

252. *Id.* at 18, 24.

253. *Id.* at 23.

254. *Id.* at 24.

255. *Id.* (citing *Paragon Family Rest. v. Bartolini*, 799 N.E.2d 1048, 1056 (Ind. 2003)).

256. *Id.*

257. *Id.*

258. 902 N.E.2d 878 (Ind. Ct. App. 2009).

259. *Id.* at 879-80.

Harbrecht, while constructing the residence of general contractor Gerhard King ("Gerhard") and Christine King, left an open hole in the stairs.<sup>260</sup> Kenneth E. Smith, Jr. sustained personal injuries suffered after he fell through the uncovered stairway opening.<sup>261</sup> Kenneth and his wife filed a complaint against the Kings and Harbrecht,<sup>262</sup> and the trial court entered summary judgment for the Kings concerning Smith's claims.<sup>263</sup>

In affirming summary judgment, the court first concluded that the Kings owed no duty as homeowners to Kenneth, because the danger of the hole was known and obvious.<sup>264</sup> The court found the real issue to be whether "the Kings were required to maintain the property in a reasonably safe condition for independent contractors and their employees."<sup>265</sup> The court restated the general rule that property owners must maintain their property in a "reasonably safe condition for business invitees, including independent contractors and their employees."<sup>266</sup> A property owner does not, however, have a "duty to furnish the employees of an independent contractor a safe place to work, at least as that duty is imposed on employers."<sup>267</sup> The issue of liability turns on whether "the defendant was in control of the premises when the accident occurred."<sup>268</sup> The court also looks to whether a landowner in those circumstances could have prevented any foreseeable danger.<sup>269</sup> The evidence demonstrated that Kenneth was aware of the opening in the residence before to his accident, because he climbed into it using a ladder previously.<sup>270</sup>

The court next addressed the issue of Gerhard's liability as general

---

260. *Id.*

261. *Id.* at 880.

262. *Id.* The trial court also found that the Kings were not vicariously liable for Harbrecht's negligence. This issue was not raised on appeal. *Id.*

263. *Id.*

264. *Id.* at 882.

265. *Id.*

266. *Id.* at 881-82 (citing *Merrill v. Knauf Fiber Glass GmbH*, 771 N.E.2d 1258, 1264-65 (Ind. Ct. App. 2002)); *see also* RESTATEMENT (SECOND) OF TORTS § 343 (1965) (defining the duty owed by landowners, which Indiana has adopted as: "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger"); RESTATEMENT (SECOND) OF TORTS § 343A(a) (1965) states that "[a] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness."

267. *Smith*, 902 N.E.2d at 881-82 (citing *Merrill*, 771 N.E.2d at 1264-65).

268. *Id.* at 882 (citing *Rhodes v. Wright*, 805 N.E.2d 382, 385 (Ind. 2004)).

269. *Id.*

270. *Id.*



contractor.<sup>271</sup> The general rule of the duty owed by a general contractor is that “an employer does not have a duty to supervise the work of an independent contractor to assure a safe workplace and consequently is not liable for the negligence of the independent contractor.”<sup>272</sup> Five exceptions to this rule, as recognized in Indiana, include:

(1) where the contract requires . . . intrinsically dangerous work; (2) where one party is by law or contract charged with performing the specific duty; (3) where the performance of the contracted act will create a nuisance; (4) where the act to be performed will probably cause injury to others unless due precaution is taken; and (5) where the act to be performed is illegal.<sup>273</sup>

Although “a contractor has a duty to use reasonable care both in his or her work and in the course of performance,”<sup>274</sup> the plaintiffs did not argue to the trial court that the defendants were liable based on Gerhard’s negligence as general contractor, and therefore, waived their right to appeal this issue.<sup>275</sup>

Finally, the court concluded that Gerhard did not assume a duty to Kenneth when he nailed a plywood sheet atop the opening.<sup>276</sup> One may raise a duty of care by conduct, creating “a special relationship between the parties and a corresponding duty to act in the manner of a reasonably prudent person.”<sup>277</sup> Gerhard’s single instance of nailing the plywood sheet as a safety precaution does not raise a jury question regarding assumed duty because it was not sufficient to “constitute a deliberate attempt to control or actively supervise safety at the job site.”<sup>278</sup> “[O]ne or two instances of safety precautions taken by the defendant does not raise a jury question as to whether a duty was assumed.”<sup>279</sup>

#### *D. Natural Conditions Upon the Land*

The final damages case decided during the survey period is *May v. George*.<sup>280</sup> In this case, Dwight R. May sued Jerry George after a tree that fell from George’s property landed on May’s truck, injuring May.<sup>281</sup> The trial court granted

---

271. *Id.* at 883.

272. *Id.* (quoting *Stumpf v. Hagerman Constr. Corp.*, 863 N.E.2d 871, 876 (Ind. Ct. App. 2007)).

273. *Id.* (citing *Stumpf*, 863 N.E.2d at 876).

274. *Id.* (citing *Peters v. Forster*, 804 N.E.2d 736, 734 (Ind. 2004)).

275. *Id.*

276. *Id.* at 884.

277. *Id.* at 883 (quoting *Merrill v. Knauf Fiber Glass GmbH*, 771 N.E.2d 1258, 1270 (Ind. Ct. App. 2002)).

278. *Id.* at 884 (quoting *Merrill*, 771 N.E.2d at 1271).

279. *Id.* (citing *Robinson v. Kinnick*, 548 N.E.2d 1167, 1170 (Ind. Ct. App. 1989)).

280. 910 N.E.2d 818 (Ind. Ct. App. 2009).

281. *Id.* at 820-21.

George's motion for summary judgment.<sup>282</sup>

The court concluded that George owed no duty to May.<sup>283</sup> The court recited the Indiana Supreme Court's interpretation of the *Valinet* rule, which denies liability for landowners for physical harm caused by others or natural conditions upon their land.<sup>284</sup> The general exception to this rule applies when the landowner has "actual knowledge of a dangerous natural condition, regardless of location."<sup>285</sup> Moreover, possessors of land in urban areas may be subject to liability for failing to "exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near [a] highway."<sup>286</sup> Although continuous inspections are not required to satisfy a duty to motorists under *Valinet*, periodic inspections of trees may be reasonably required in some circumstances.<sup>287</sup>

The court found that George's land was rural, excluding him from the *Valinet* exception for urban possessors of land.<sup>288</sup> The property was used for agricultural purposes, was not near any city, town, business, or residence.<sup>289</sup> Also, May failed to designate evidence to the contrary, making this a clear-cut distinction from former cases.<sup>290</sup>

The court then found that the tree was a natural condition on George's land.<sup>291</sup> "A natural condition is 'land that was not changed by any acts of humans' and includes 'the natural growth of vegetation, such as weeds, on land that is not artificially made receptive to them.'"<sup>292</sup> The tree in question was approximately sixty years old, and no evidence suggested that other trees or

---

282. *Id.* at 820.

283. *Id.* at 826.

284. *Id.*; see generally *Valient v. Eskew*, 574 N.E.2d 283, 285 (Ind. 1991) (adopting RESTATEMENT (SECOND) OF TORTS § 363 (1965) and stating that whether a duty is imposed on a landowner to prevent harm caused by falling trees requires the consideration of factors such as land use and traffic patterns); RESTATEMENT (SECOND) OF TORTS § 363 (1965) (stating the rule that "(1) [e]xcept as stated in Subsection (2), neither a possessor of land, nor a vendor, lessor, or other transferor, is liable for physical harm caused to others outside of the land by a natural condition of the land. (2) A possessor of land in an urban area is subject to liability to persons using a public highway for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway.").

285. *May*, 910 N.E.2d at 823 (quoting *Valient*, 574 N.E.2d at 285).

286. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 363 (1965)); see also *Valient*, 574 N.E.2d at 285.

287. *May*, 910 N.E.2d at 824 (quoting *Valient*, 574 N.E.2d at 286).

288. *Id.*; see generally *Valient*, 574 N.E.2d at 285.

289. *May*, 910 N.E.2d at 824.

290. *Id.*; *Miles v. Christensen*, 724 N.E.2d 643, 646 (Ind. Ct. App. 2000) (holding that "determination of a landowner's duty does not hinge solely upon the 'urban'/'rural' distinction," but also factors such as traffic patterns and land use must be taken into account when determining a landowner's liability).

291. *May*, 910 N.E.2d at 824.

292. *Id.* (quoting *Spears v. Blackwell*, 666 N.E.2d 974, 977 (Ind. Ct. App. 1996)).



manmade objects interfered with the natural condition of the tree.<sup>293</sup>

In affirming summary judgment, the court concluded that there was not sufficient evidence to support May's assertion that George knew or should have known that the tree was in a dangerous condition.<sup>294</sup> The court agreed with the trial court's rejection of photographs and affidavits introduced by May to create an issue of fact, because none of the evidence would have aided May's argument and May failed to supplement discovery at trial.<sup>295</sup>

## VI. WORKER'S COMPENSATION

In *Beatty v. LaFountaine*,<sup>296</sup> the Indiana Court of Appeals affirmed the trial court's grant of summary judgment in favor of the defendant.<sup>297</sup> In *Beatty*, James Thad Martin, while delivering logs for LaFountaine Logging caused a tractor-trailer collision with Rodger Beatty and Nora K. Beatty which resulted in Nora Beatty's death.<sup>298</sup> Representatives of Beatty's estate brought a wrongful death action against LaFountaine.<sup>299</sup> The court previously addressed circumstances of this case three separate times.<sup>300</sup>

It is long-standing Indiana law "that a principal is not liable for the negligence of an independent contractor."<sup>301</sup> The Indiana Supreme Court established a ten-factor test to distinguish employees from independent contractors:

- (a) The extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;

---

293. *Id.*

294. *Id.* at 825.

295. *Id.*

296. 896 N.E.2d 16 (Ind. Ct. App. 2008), *trans. denied*, 915 N.E.2d 982 (Ind. 2009).

297. *Id.* at 17-18.

298. *Id.* at 17-19.

299. *Id.*

300. *Id.* at 18; *see Walker v. Martin*, 887 N.E.2d 125 (Ind. Ct. App.), *trans. denied*, 898 N.E.2d 1233 (Ind. 2008) (most recent of the three prior appeals).

301. *Beatty*, 896 N.E.2d at 20 (citing *Walker*, 887 N.E.2d at 131).

- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.<sup>302</sup>

Although one's status as an employee or independent contractor is generally a question of fact, such an issue may be resolved as a question of law if the facts are undisputed.<sup>303</sup> Although courts must consider all ten factors, and no one factor should be dispositive, "'extent of control' is the single most important factor."<sup>304</sup>

In this case, the court applied the same analysis as it employed in the last appeal concerning similar facts to affirm the trial court's conclusion that Martin was an independent contractor instead of an employee.<sup>305</sup> The court reasoned that, "except for being told where to pick up and deliver the logs, all of the details of how the job was to be done were left to Martin's discretion."<sup>306</sup> It was determined that others engaged in hauling logs locally were considered specialists.<sup>307</sup> Moreover, Martin never maintained regular, continuous hours with LaFontaine, nor did Martin earn a profit from the transport of the logs.<sup>308</sup> The court determined that the only factor that weighed in favor of an employee status for Martin is the fact "that LaFontaine was a business engaged in the procuring and selling of timber logs."<sup>309</sup>

Notwithstanding the status of Martin, the court also concluded that LaFontaine did not assume a nondelegable duty to the plaintiff concerning the safety of the tractor-trailer.<sup>310</sup> The court reasserted the "long-standing general rule" that "a principal is not liable for the negligence of an independent contractor" with only limited exceptions.<sup>311</sup> But the court declined to apply any of the exceptions to LaFontaine's duty.<sup>312</sup>

---

302. *Id.* at 20-21 (listing the factors found in RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958) as adopted by Indiana) (citing *Moberly v. Day*, 757 N.E.2d 1007, 1010 (Ind. 2001)).

303. *Id.* at 20.

304. *Id.* at 21 (quoting *Walker*, 887 N.E.2d at 131; *Moberly*, 757 N.E.2d at 1010); *see also* RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958).

305. *Beatty*, 896 N.E.2d at 22.

306. *Id.* at 21.

307. *Id.*

308. *Id.*

309. *Id.* at 22.

310. *Id.*

311. *Id.* (quoting *Selby v. N. Ind. Pub. Serv. Co.*, 851 N.E.2d 333, 337 (Ind. Ct. App. 2006) (stating the exceptions to the *Selby* rule are that: "(1) where the contract requires the performance of intrinsically dangerous work; (2) where the principal is by law or contract charged with performing the specific duty; (3) where the act will create a nuisance; (4) where the act to be performed will probably cause injury to others unless due precaution is taken; and (5) where the act to be performed is illegal." Such duties are "deemed 'so important to the community' that the principal should not be permitted to transfer those duties to another.")).

312. *Id.* at 23.



## VII. DEFAMATION AND TORTIOUS INTERFERENCE

A. *Invasion of Privacy*

In *Vargas v. Shepherd*,<sup>313</sup> Dr. Elian M. Shepherd treated Ruben Vargas for injuries Vargas sustained while working at an apartment complex.<sup>314</sup> During a subsequent lawsuit between Vargas and the apartment, Shepherd reviewed Vargas's medical records and prepared a report concerning them for the apartment's lawyer.<sup>315</sup> Believing that Shepherd impermissibly disclosed his medical history, Vargas sued Shepherd alleging invasion of privacy, and breach of fiduciary duty.<sup>316</sup> The Lake County Superior Court granted the Shepherd's motion for summary judgment.<sup>317</sup>

The court recited the elements for invasion of privacy as: "(1) intrusion upon seclusion; (2) appropriation of likeness; (3) public disclosure of private facts; and (4) false-light publicity."<sup>318</sup> The court noted that "disclosure of private facts occurs when a person gives 'publicity' to a matter that concerns the 'private life' of another, a matter that would be 'highly offensive' to a reasonable person and that is not of legitimate public concern."<sup>319</sup>

A narrow interpretation of the publicity element "requires communication to the public at large or to so many persons that the matter is substantially certain to become one of public knowledge."<sup>320</sup> However, a more liberal view permits "a disclosure to be actionable even if not made to the public at large, as long as it is made to a 'particular public' with a special relationship to the plaintiff."<sup>321</sup>

In affirming the trial court's grant of summary judgment in favor of Shepherd, the court concluded that Shepherd revealed no confidential information related to Vargas' treatment.<sup>322</sup> The court found that Shepherd merely reiterated information to the apartment's attorney.<sup>323</sup> Therefore, Shepherd could not have committed an invasion of privacy by disclosing confidential information concerning Vargas's medical records.<sup>324</sup>

---

313. 903 N.E.2d 1026 (Ind. Ct. App. 2009).

314. *Id.* at 1029.

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* at 1031 (citing *Munsell v. Hambright*, 776 N.E.2d 1272, 1282 (Ind. Ct. App. 2002), *trans. denied*, 792 N.E.2d 39 (2003)).

319. *Id.* (quoting *Munsell*, 776 N.E.2d at 1282).

320. *Id.* (quoting *Munsell*, 776 N.E.2d at 1282).

321. *Id.*

322. *Id.*

323. *Id.* (quoting *Doe v. Methodist Hosp.*, 690 N.E.2d 681, 692 (Ind. 1992)).

324. *Id.*

*B. Libel & Slander*

In *West v. Wadlington*,<sup>325</sup> the court of appeals reversed and remanded the trial court's dismissal of a defamation and invasion of privacy-false light suit.<sup>326</sup> This portion of the Article only discusses the defamation claims. Rosalyn West, Betty Wadlington, Jeanette Larkins were members of the Mt. Olive Missionary Baptist Church.<sup>327</sup> Wadlington sent an email to Larkins viciously attacking West's character and accusing her of plotting to oust a pastor.<sup>328</sup> Larkins received the message at her government address and forwarded it to eight-nine other fellow church members.<sup>329</sup> West brought a defamation and invasion of privacy and false light suit in Marion County Superior Court against Wadlington, Larkins, and Larkins's employer, the City of Indianapolis.<sup>330</sup> The court granted the Defendants' motion to dismiss citing that the case would become "'excessively entangled' in church policies and doctrines."<sup>331</sup>

The *Brazauskas I* rule prohibits courts from analyzing defamation claims because it would require it to "engag[e] in an impermissible scrutiny of religious doctrine."<sup>332</sup> Determining defamation under neutral principles of law had previously only been applied to disputes involving church property.<sup>333</sup> "[T]he First Amendment effectively prohibits civil tribunals from reviewing these reasons to determine whether the statements are either defamatory or capable of a religious interpretation related to the employee's performance of her duties."<sup>334</sup> In *Wadlington*, like *Brazauskas I*, the alleged defamatory statements were made in the context of the termination of a church employee; therefore, addressing the issue would require the court so to "intrude into a purely ecclesiastical dispute."<sup>335</sup>

The court could not "state with the level of certainty called for in summary judgment proceedings that the statements contained in Wadlington's letter remained a purely intra-church dispute."<sup>336</sup> West argued that because Larkins used a government email account to send the letter to others, there is a

---

325. 908 N.E.2d 1157 (Ind. Ct. App. 2009).

326. *Id.* at 1168.

327. *Id.* at 1159.

328. *Id.* at 1159-61.

329. *Id.* at 1161.

330. *Id.* at 1159. The City of Indianapolis was included as a defendant in the lawsuit because they employed Larkins (through the Indianapolis Metropolitan Police Department) at all times relevant in this case.

331. *Id.*

332. *Id.* at 1165 (citing *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*, 714 N.E.2d 253, 262 (Ind. Ct. App. 1999)).

333. *Id.* (citing *Brazauskas*, 714 N.E.2d at 262).

334. *Id.* (quoting *Brazauskas*, 714 N.E.2d at 762).

335. *Id.* at 1166. The court did note that *Brazauskas I* is discernible from the case at bar. *Id.*

336. *Id.*



“reasonable possibility” that recipients attributed the email to the City.<sup>337</sup> The Defendants referred to Larkins’ affidavit, which provided that “to the best of my knowledge all of the email addresses identified in [the email] belong to members of or are associated with the Church.”<sup>338</sup> The court found that the affidavit failed to state that “only Church members have access to the email addresses or that only Church members saw the email Larkins forwarded.”<sup>339</sup>

The court concluded that the emails “could be defamatory without any question of religious doctrine or practice.”<sup>340</sup> Communications that impute criminal conduct is considered per se defamation.<sup>341</sup> Although the court concluded that the emails fail to show that West physically attacked the former pastor and his family, the court could reasonably infer such.<sup>342</sup> A claim in Wadlington’s letter calling West an “evil spirit,” “a one-woman wrecking crew,” and stating that she behaved disrespectfully,<sup>343</sup> “could be considered defamatory in a secular sense.”<sup>344</sup>

Finally, the court concluded that it did not have to view the letter entirely in a religious context.<sup>345</sup> To conclude otherwise “would allow someone to shield any number of defamatory statements simply by framing them in the context of a religious dispute.”<sup>346</sup>

In *Dugan v. Mittal Steel USA, Inc.*,<sup>347</sup> Mittal Steel USA, Inc. fired Christine Dugan following a North America Security Solutions (NASS) investigation into a theft ring.<sup>348</sup> Mittal subsequently rehired Dugan following arbitration.<sup>349</sup> Dugan filed suit against Mittal, NASS, and Mittal employee Jay Komorowski claiming defamation per se and intentional infliction of emotional distress. In her complaint, Dugan alleged the following:

6. In April 2004, [Mittal employee] Komorowski told Kevin Vana, chief of security at Mittal, that [Dugan] was stealing time by working on Sundays on a “core exchange” scheme with her boss, Albert Verduco, allegedly an attempt to defraud [Mittal]. [Komorowski] also accused [Dugan] of stealing an air compressor from [Mittal].

7. On or about September 9, 2004, [Komorowski] told Jim McClain and

---

337. *Id.*

338. *Id.* (alteration in original).

339. *Id.*

340. *Id.* at 1167.

341. *Id.* (citing *Kelley v. Tanoos*, 865 N.E.2d 593, 596 (Ind. 2007)).

342. *Id.*

343. *Id.*

344. *Id.* at 1167-68 (citing *Kliebenstein v. Iowa Conference of United Methodist Church*, 663 N.W.2d 404, 405-08 (Iowa 2003)).

345. *Id.* at 1168.

346. *Id.*

347. 911 N.E.2d 692 (Ind. Ct. App. 2009).

348. *Id.* at 694.

349. *Id.*

Zigmund Gorroll, employees of [Mittal], that [Dugan] was working on a “core exchange” (theft) of welding machines with her boss, Albert Verduco.<sup>350</sup>

The trial court granted summary judgment in favor of Defendants, and Dugan appealed only on the issue of defamation.<sup>351</sup>

The court defined the tort of defamation as a communication “that tends to harm a person’s reputation by lowering the person in the community’s estimation or deterring third persons from dealing or associating with the person.”<sup>352</sup> The elements of defamation are: “(1) a communication with defamatory imputation, (2) malice, (3) publication, and (4) damages.”<sup>353</sup> “Communications are considered defamatory per se when they impute 1) criminal conduct; 2) a loathsome disease; 3) misconduct in a person’s trade, profession, office, or occupation; or 4) sexual misconduct to the plaintiff.”<sup>354</sup>

The defense to defamation is the doctrine of qualified privilege.<sup>355</sup> In order to prove qualified privilege, one must establish “good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner to the appropriate parties only.”<sup>356</sup> Once the defendant has established the privilege, the burden shifts to the plaintiff to show abuse by establishing “that: (1) the communicator was primarily motivated by ill will in making the statement; (2) there was excessive publication of the defamatory statements; or (3) the statement was made without belief or grounds for belief in its truth.”<sup>357</sup>

The court concluded that although Komorowski’s statements concerning paragraph six were defamatory per se,<sup>358</sup> the public interest privilege protected the statements.<sup>359</sup> The public interest privilege is applied to “‘communications made to law enforcement to report criminal activity’ on the basis that such statements ‘enhanc[e] public safety by facilitating the investigation of suspected criminal activity.’”<sup>360</sup> Komorowski’s statements made to Kevin Vana “relate to suspected criminal activity at Mittal.”<sup>361</sup> But it was undisputed that Komorowski made the

---

350. *Id.* at 696 (citing Appellant’s App. at 28) (alterations in original).

351. *Id.* at 694.

352. *Id.* at 695 (citing *Kelly v. Tanoos*, 865 N.E.2d 593, 596 (Ind. 2007)).

353. *Id.* (citing *Hamilton v. Prewett*, 860 N.E.2d 1234, 1243 (Ind. Ct. App. 2007)).

354. *Id.* at 695-96 (citing *Trail v. Boys & Girls Clubs of Nw. Ind.*, 845 N.E.2d 130, 137 (Ind. 2006) (citations and quotations omitted)).

355. *Id.* at 697.

356. *Id.* (citing *Schrader v. Eli Lilly & Co.*, 639 N.E.2d 258, 262 (Ind. 1994)).

357. *Id.* (citing *Coachmen Indus., Inc. v. Dunn*, 719 N.E.2d 1271, 1276 (Ind. Ct. App. 1999) (citation omitted)).

358. *Id.* at 696.

359. *Id.* at 698.

360. *Id.* at 697 (citing *Kelley v. Tanoos*, 865 N.E.2d 593, 600 (Ind. 2007) (alterations in original)).

361. *Id.*



statements in good faith.<sup>362</sup> Dugan failed to offer anything beyond unsupported assertions that Komorowski abused the privilege.<sup>363</sup>

But the court reversed the grant of summary judgment concerning paragraph seven of Dugan's complaint because there was no indication that the common interest privilege protected Komorowski's statement concerning the core exchange.<sup>364</sup> The qualified privilege of common interest "protects communication made in connection with membership qualifications, employment references, intracompany communications, and the extension of credit."<sup>365</sup> Here, Komorowski said in his deposition that:

A. I do remember the one time that employees were very-hourly supervisors were upset with what was going on [i.e., NASS's theft investigation at Mittal] and had very much concern. And since I was their supervisor we kind of had a quick meeting of some of their questions. *And I was to stop the rumors and calm them down.*

Q. Okay. What were the rumors?

A. No one was sure if more people were going to be terminated. That was really the biggest thing. They were-everyone was on edge. Was the investigation over? *Which I really did not know.* Were more going to be terminated? *Which I did not know.* Were they themselves going to be terminated? I mean, these were-

Q. Were any of the rumors about Albert Verduczo [sic] taking equipment from the company?

A. Yes.

Q. Were those-was this talked about in this supervisor's [sic] meeting?

A. Yes.<sup>366</sup>

The court was unconvinced that the statement "was made for the purpose of 'facilitating the investigation of suspected criminal activity'" making the public interest privilege inapplicable.<sup>367</sup> The court failed to see how Komorowski's statements were limited to the purpose of upholding his interest concerning an admission that "he did not know whether the investigation was over or whether more employees would be terminated."<sup>368</sup> Thus, the court concluded that Mittal failed to establish that the common interest privilege protected the statement.<sup>369</sup>

### *C. Tortious Interference with a Contractual Relationship*

The Indiana Court of Appeals addressed a number of cases concerning

---

362. *Id.* at 698.

363. *Id.*

364. *Id.* at 700.

365. *Id.* at 698 (citing *Kelley*, 865 N.E.2d at 597-98).

366. *Id.* at 699-700 (citing Appellees' App. at 151 (p. 23 of Komorowski's deposition)).

367. *Id.* at 698 (citing *Kelley*, 865 N.E.2d at 600).

368. *Id.* at 700.

369. *Id.*

tortious interference during the survey period. A key issue, among the four addressed by the court in *Stoffel v. Daniels*<sup>370</sup> concerned whether the trial court properly denied the plaintiffs' declaratory and injunctive action on the grounds of tortious interference.<sup>371</sup> In 2008, Indiana enacted legislation abolishing the office of township assessor.<sup>372</sup> Plaintiff, and Huntington township assessor, Joan Stoffel, individually and as Representative of Class of State Township Assessors brought suit against Indiana Governor Mitchell E. Daniels, State of Indiana, Commissioner Cheryl Musgrave, and the Indiana Department of Local Government Finance (DLGF).<sup>373</sup> The trial court granted the DLGF's motion to dismiss,<sup>374</sup> and on appeal, Stoffel asserted, among other things, that DLGF wrongly interfered with "her contractual right to her public office."<sup>375</sup>

The court recited the elements to tortious interference with a contract as, "(1) the existence of a valid and enforceable contract; (2) defendant's knowledge of the existence of the contract; (3) defendant's intentional inducement of breach of the contract; (4) the absence of justification; and (5) damages resulting from defendant's wrongful inducement of the breach."<sup>376</sup>

The court briefly concluded that tortious interference with a contractual relationship was impossible because no contract could exist in this instance.<sup>377</sup> As a township assessor, Stoffel was considered a "public officer," which is defined as "one who holds an elective or appointive position for which public duties are prescribed by law."<sup>378</sup> The court reaffirmed the long-held rule that the duties of a public officer are based in the law, legislative will, and constitutional protections against interference, instead of contract or "obligations which cannot be changed or impaired."<sup>379</sup>

The court returned to the issue of tortious interference less than a month later in *Columbus Medical Service Organization v. Liberty Healthcare Corp.*<sup>380</sup> Columbus Medical Services Organization won a competitive bid to provide medical staffing services at Logansport State Hospital over its competitor, Liberty Healthcare Corporation.<sup>381</sup> Liberty filed suit against Columbus alleging that, but for Columbus's false representations in submitting its bid, Liberty would

---

370. 908 N.E.2d 1260 (Ind. Ct. App. 2009).

371. *Id.* at 1263.

372. *Id.* at 1263-65.

373. *Id.* at 1265.

374. *Id.* at 1266.

375. *Id.* at 1270.

376. *Id.* (citing *Bilimoria Computer Sys., L.L.C. v. Am. Online, Inc.*, 829 N.E.2d 150, 156 (Ind. Ct. App. 2005)).

377. *Id.* at 1271.

378. *Id.* (citing *Mosby v. Bd. of Comm'rs*, 186 N.E.2d 18, 20 (1962)).

379. *Id.*; see generally *State ex rel. Black v. Burch*, 80 N.E.2d 294, 299 (Ind. 1948); *State ex rel. Yancey v. Hyde*, 28 N.E. 186, 187 (Ind. 1891); *Stuckey v. State*, 560 N.E.2d 88, 91 (Ind. Ct. App. 1990); *Mosby v. Bd. of Comm'rs*, 186 N.E.2d 18, 20 (Ind. App. 1962).

380. 911 N.E.2d 85 (Ind. Ct. App. 2009).

381. *Id.* at 87-91.



have acquired the winning bid and the Hospital would have retained six medical staff.<sup>382</sup>

The trial court concluded that Columbus made knowing substantial false representations, constituting tortious interference.<sup>383</sup> Although the court of appeals did not address Columbus' uncontested findings concerning unjustified interference on appeal, the court did hold, among other things, that tortious interference with a business relationship "requires some independent illegal action."<sup>384</sup>

### CONCLUSION

Indiana tort law saw significant changes in the area of damages since the previous survey period. *Stanley v. Walker*<sup>385</sup> will have a lasting effect on the way practitioners plan long-term litigation strategies and frame methods for recovery for their clients. Practitioners should pay close attention to the Indiana General Assembly during the following survey periods to see if the legislature undertakes further action in reaction to the supreme court's decisions concerning excessive punitive damages and determining reasonable value of medical services.

---

382. *Id.* at 91.

383. *Id.* at 92-93.

384. *Id.* at 95 (citing *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*, 796 N.E.2d 286, 291 (Ind. 2003)).

385. 906 N.E.2d 852 (Ind. 2009).



















